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LABOR ARBITRATION IN THE FEDERAL COURTS: Excerpts from a report of the Sub-Committee on Labor Arbitration Law of the Section on Labor Relations Law, American Bar Association*

A. *The three Supreme Court decisions of June,* 1960 *defining the respective roles of the courts and arbitrators in labor arbitration.*[1]

The problem of the appropriate relationship of the courts to the arbitration process has long perplexed those involved in labor relations. In *Lincoln Mills*[2] the Supreme Court directed the courts to "fashion" the "substantive law" to be applied in actions to enforce collective bargaining agreements containing arbitration clauses.

On the heels of the U.S. Supreme Court decision in the celebrated *Lincoln Mills* case the Federal Courts were confronted with a barrage of cases concerning the arbitrability of particular labor disputes and involving the age-old problem of the respective roles of the courts and arbitrators in labor arbitration cases.

On June 20, 1960 the U.S. Supreme Court handed down three landmark decisions settling many of the troublesome questions raised by the earlier *Lincoln Mills* decision and constituting a veritable primer for the future on the roles to be played by the courts and labor arbitrators in the field of labor arbitration.[3] In short, these

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* We are indebted to the Sub-Committee on Labor Arbitration Law of the Section on Labor Relations Law, American Bar Association, for permission to reproduce portions of its report. Co-Chairmen of the Section are Robert A. Levitt and Robert M. Segal. Members are: Thomas E. Bracken, Joseph Brandschain, Robert Sumner Coit, Jerome A. Cooper, Edward Davis, John Delaney, Jr., Robert W. Gilbert, Robert L. Howard, Bethel B. Kelley, Marion C. Ladwig, Robert Littler, S. M. Lyman, Lydon F. Maider, Harry S. Manchester, Louis P. Poulton, Herbert Lee Segal, John L. Waddleton, Carl A. Warns, Jr., William M. Watson and Benjamin Wyle.

1. These decisions were handed down after the Committee's report was completed. The summary and analysis of the decisions contained herein was drafted under considerable time pressure and should be viewed in that light.
2. *Textile Workers Union of America v. Lincoln Mills of Alabama,* 353 U.S. 448 (1957).
3. *United Steelworkers v. American Mfg. Co.,* 46 LRRM 2414; *id. v. Warrior and Gulf Navigation Co.,* 46 LRRM 2416; *id. v. Enterprise Wheel & Car Corp.,* 46 LRRM 2423.

decisions vastly enhance the authority and status of labor arbitrators and correspondingly diminish the role of the courts in labor arbitration.

Among the most significant principles laid down by the Supreme Court in these three decisions were the following:

1. A grievance should not be excluded from arbitration by the courts unless it can be said "with positive assurance" that the subject is not arbitrable and doubts should be resolved in favor of arbitrability.

2. The Court acknowledged (in a footnote) that the question of arbitrability of a grievance is a question for the courts and not arbitrators, and when it is claimed that an arbitrator rather than a court should resolve such a question, "the claimant must bear the burden of a clear demonstration of that purpose."

3. The *Cutler-Hammer* doctrine[4] was specifically rejected as having "a crippling effect on grievance arbitration." Instead, the Supreme Court held that the courts "have no business weighing the merits of a grievance" and "even frivolous claims" are subject to arbitration.

4. Arbitrators should have "flexibility" in "formulating remedies" and they have "no obligation to the court to give their reasons for an award" or even to write awards free of ambiguity.

Turning now to a more detailed look at these important decisions, in *American Mfg. Co.*[5] the Union brought an action in the district court to compel arbitration under 301 of the Taft-Hartley Act of a grievance involving the company's refusal to reinstate an employee to a job after he had settled a workmen's compensation claim against the company based upon a permanent partial disability. The arbitration clause in the contract was a standard clause subjecting to arbitration all disputes as to "meaning, interpretation and application" of the agreement. The contract also contained a "management rights" clause which, among other things, reserved to the company the power to suspend or discharge any employee "for

4. *International Association of Machinists v. Cutler-Hammer, Inc.*, 271 App. Div. 917, aff'd 297 N.Y. 519, under which the Court of Appeals had held that where the meaning of a contract provision sought to be arbitrated was beyond dispute, there was nothing to arbitrate and the contract could not be said to provide for arbitration.

5. See footnote 3 above.

cause." It also provided that the employer would employ and promote employees on the basis of seniority "where ability and efficiency are equal." The employee in question left his work due to an injury and while away brought an action for compensation benefits. The case was settled, the employee's own doctor expressing the opinion that the injury had given him a 25% permanent partial disability. Two weeks later the Union filed the instant grievance charging that the employee should be returned to his job by virtue of the seniority provisions of the contract. The company refused to arbitrate, claiming (1) the employee was estopped because he had only a few days before settled a workmen's compensation claim on the basis of a permanent partial disability; (2) he was not physically able to do the work; and (3) this type of dispute was not arbitrable under the contract.

The District Court sustained the company's position on the ground that the employee having accepted the workmen's compensation settlement on the basis of permanent disability was estopped to claim any seniority or employment rights. The Circuit Court affirmed on the ground that the grievance was "a frivolous, patently baseless one, not subject to arbitration under the collective bargaining agreement." The Supreme Court reversed and held the matter to be arbitrable.

The Supreme Court, at the outset, pointed to 203 (d) of the Taft-Hartley Act, which declares that voluntary adjustment of disputes is the desirable method for settling grievance disputes concerning application or interpretation of contracts and declared that that policy could be effectuated only if the means chosen by the parties to settle differences under a contract were "given full play."

The Supreme Court then proceeded to reject the *Cutler-Hammer* doctrine enunciated by the New York Court of Appeals and followed by many other courts wherein it was held that where the meaning of a contract provision is clear there is nothing to arbitrate, declaring that this decision "could only have a crippling effect on grievance arbitration." The Court went on to point out:

> "The courts therefore have no business weighing the merits of the grievance, considering whether there is equity in a particular claim, or determining whether there is particular language in the written instrument which will support the claim. The agreement is to submit all grievances to arbitration, not merely those the court will deem meritorious. The processing of even frivolous

claims may have therapeutic values [of] which those who are not a part of the plant environment may be quite unaware."

Mr. Justice Whittaker wrote a brief concurring opinion in this case, merely pointing out that he felt the District Court lacked jurisdiction to determine the merits of the claim which the parties had validly agreed to submit to arbitration.

In *Warrior & Gulf Navigation*[6] the company had laid off some employees and this layoff was due in part to the fact that it had contracted-out certain maintenance work previously done by its own employees. The Union filed a grievance claiming a lockout. The contract had both no-strike and no-lockout provisions. It had a broad arbitration clause calling for arbitration of differences as to "meaning and application" of the contract "or should any local trouble of any kind arise." However, it also provided that "matters which are strictly a function of management shall not be subject to arbitration."

The Union sought to arbitrate the grievance; the company refused and the Union brought an action to compel under 301. The District Court sustained the company's refusal to arbitrate on the ground that the contract did not give the arbitrator the right to review the company's business judgment in contracting-out work. The lower court said that this was strictly a function of management and not limited in any way by the contract. The Court of Appeals affirmed, holding that the contract had excluded from the grievance procedure matters which were "strictly a function of management" and that contracting-out fell within that exception. The Supreme Court reversed both lower courts and held the grievance to be arbitrable. The Supreme Court noted that though the agreement provided that matters which were "strictly a function of management" were not subject to arbitration, the contract also said that if differences arose concerning "any local trouble of any kind" the grievance procedure would be applicable.

From this the Court concluded that arbitration should be ordered unless it could be said "with positive assurance" that the subject was not arbitrable, with doubts being resolved in favor of coverage.

The Court did acknowledge (footnote 7) that in both the agreement in this case and that involved in *American Mfg.* the question of arbitrability was for the courts and not the arbitrators and that wherever it was claimed that questions of arbitrability were

6. See footnote 3 above.

to be resolved by arbitrators rather than the courts "the claimant must bear the burden of a clear demonstration of that purpose."

The Court went on to observe, however, that, apart from matters which the parties specifically excluded from arbitration, all of the questions on which the parties disagreed came within the scope of the grievance and arbitration provisions of the collective agreement.

The Court defined the role to be played by arbitrators in broad terms as follows:

> "The labor arbitrator performs functions which are not normal to the courts; the considerations which help him fashion judgments may indeed be foreign to the competence of courts. The labor arbitrator's source of law is not confined to the express provisions of the contract, as the industrial common law—the practices of the industry and the shop—is equally a part of the collective bargaining agreement although not expressed in it. The labor arbitrator is usually chosen because of the parties' confidence in his knowledge of the common law of the shop and their trust in his personal judgment to bring to bear considerations which are not expressed in the contract as criteria for judgment. The parties expect that his judgment of a particular grievance will reflect not only what the contact says but, insofar as the collective bargaining agreement permits, such factors as the effect upon productivity of a particular result, its consequence to the morale of the shop, his judgment whether tensions will be heightened or diminished."

The Court attached considerable significance to the existence of an "absolute no-strike clause" in a contract pointing out that where such a clause existed "everything that management does is subject to the agreement, for either management is prohibited or limited in the action it takes, or if not, it is protected from interference by strikes."[7]

Adverting to the language of the agreement in question, which provided that matters which were "strictly a function of management shall not be subject to arbitration," the Court said that language must be interpreted as referring only to that over which the contract gave management "complete control and unfettered dis-

7. The concurring opinion of Mr. Justice Brennan (joined by Messrs. Justices Harlan and Frankfurter) pointed out that it was not understood that the Court, in its decision, meant the principles announced depended upon the presence of a no-strike clause in the agreement.

cretion" and there was no showing that the parties intended that phrase to encompass any and all forms of contracting-out. At this point the Court observed that in the absence of an express provision excluding a particular grievance from arbitration "only the most forceful evidence of a purpose to exclude the claim from arbitration can prevail."

Characterizing the majority's holdng as "an entirely new and strange doctrine to me", Justice Whittaker, in his lone dissent, pointed out that he had understood it to be the unquestioned law that arbitrators were chosen to decide particular matters specifically submitted to them and that the contract under which such matters were submitted was both the source and limit of the arbitrator's authority and power and that arbitrators' power to decide issues, thus ousting the normal functions of the court, had to rest upon "a clear, definitive agreement of the parties, as such powers can never be implied." Justice Whittaker pointed to the fact, not referred to in the majority opinion, that the Union had acquiesced for 19 years in the employer's interpretation that contracting-out work was strictly a function of management and had repeatedly tried, "particularly in the negotiation of the agreement involved here—but unsuccessfully, to induce the employer to agree to a covenant that would prohibit it from contracting-out work." Having failed to persuade the employer to agree to stop contracting-out work or to agree to arbitrate the agreement, the Union went to Court, Justice Whittaker pointed out.

While agreeing with the majority that the courts have no proper concern with the merits of claims which the parties have agreed to submit to arbitration, Justice Whittaker felt that if the parties did not in their contract manifest by plain language their willingness to submit an issue to arbitration, then the courts must exercise their jurisdiction "to protect the citizen against the attempted use by arbitrators of pretended powers actually never conferred."

In *Enterprise Wheel*[8] the contract had the usual arbitration clause calling for arbitration of differences "as to the meaning and application" of the contract. With respect to suspension and discharge of employees, the contract provided that if an arbitrator found that an employee had been unjustly suspended or discharged, the company "shall reinstate the employee and pay full compensation at the employee's regular rate of pay for the time lost." The agree-

8. See footnote 3 above.

ment also precluded both parties from instituting civil suits or legal proceedings for alleged violation of any of the provisions of the contract. A group of employees who left their jobs in protest against the discharge of one employee were fired; a grievance was filed and the employer refused to arbitrate; the Union brought an action for specific performance of the arbitration provisions; the District Court ordered arbitration; the arbitrator held that the discharge was unjustified, though the conduct was improper. He further held that the facts justified, at most, a suspension for 10 days. After the discharge and before the arbitration award, the contract had expired but the Union continued to represent the employees at the plant. The arbitrator rejected the contention that expiration of the contract barred reinstatement and awarded reinstatement with back pay minus pay for the 10 days' suspension and such sums as the employees received from other employment. The employer refused to comply; the Union moved for enforcement; the District Court directed the employer to comply. The Court of Appeals held that the failure of the award to specify the amounts to be deducted from the back pay rendered the award unenforceable but that this defect could be remedied by requiring the parties to complete the arbitration. However, the Circuit Court further held that an award of back pay after the expiration of the contract and the requirement for reinstatement were unenforceable because the contract had expired. The Supreme Court held that the award directing reinstatement and back pay for the periods before and after expiration of the contract were enforceable under 301 of Taft-Hartley since it was not apparent that the arbitrator had gone beyond his authority to construe and apply the contract. However, the Court did agree with the Court of Appeals that the award should be resubmitted to the arbitrator to definitely determine the amounts due employees.

This decision is noteworthy for its holding that arbitrators have "flexibility" in "formulating remedies." Thus the Court said:

> "When an arbitrator is commissioned to interpret and apply the collective bargaining agreement, he is to bring his informed judgment to bear in order to reach a fair solution of a problem. This is especially true when it comes to formulating remedies. There the need is for flexibility in meeting a wide variety of situations."

The decision also observes that, while the opinion of the arbitrator as it bore on the award of back pay beyond the date of

the agreement's expiration and reinstatement was ambiguous and this ambiguity might permit the inference that the arbitrator may have exceeded his authority, this was not a reason for refusing to enforce the award. The Court said on this score:

> "Arbitrators have no obligation to the court to give their reasons for an award. To require opinions free of ambiguity may lead arbitrators to play it safe by writing no supporting opinions. This would be undesirable for a well reasoned opinion tends to engender confidence in the integrity of the process and aids in clarifying the underlying agreement."

There have been, and for many years to come there assuredly will be, sharply differing views as to the validity of these decisions. On the one hand, the decisions have been hailed as properly strengthening the position of arbitrators in labor arbitration.[9] On the other hand, critics of these decisions contend that they constitute an unwarranted and unintended aggrandizement of the arbitrator's role in labor relations and an unjustified diminution of judicial discretion in such matters. Time and experience alone will determine which of these is the correct view. It is certain that because of the great importance of these decisions in the field of labor relations, they do deserve close scrutiny and analysis by the members of the Section on Labor Relations Law.

B. *Pre-emption*

The question whether the doctrine of federal pre-emption applies in suits for specific performance under §301 is still far from being settled. Only a few decisions in the federal district courts have dealt with the question, and these are not in accord. While the *Lincoln Mills* decision held that federal substantive law shall apply in these suits, there was nothing in the Supreme Court's decision to indicate that the states might not continue to assert jurisdiction and to apply their own procedures. This the State Courts have continued to do.

A recent decision in a Federal District Court in California upheld such jurisdiction of a California State Court in *Ryan Aeronautical Co. v. UAW, Local Number 506.*[10] The Court stated

9. A N.Y. Times editorial of July 6, 1960 said, in commenting on these decisions: "The trend of these decisions is surely sound. Arbitration has proved so conclusively to be the best way to settle contract grievances that the courts have an obligation to go as far as they can, within the bounds of correct legal reasoning, to strengthen the position of those who arbitrate."
10. 45 LRRM 2321 (S.D. Calif. 1959).

that Federal Courts do not have exclusive jurisdiction of disputes arising under §301; indeed, that a final judgment of a State Court is *res judicata* on the matter, and that a Federal Court may not inquire into whether the State Court applied Federal substantive law in reaching its decision. The Federal District Court in New York has denied petitions for removal where the proceedings were to stay arbitration or to vacate an arbitration award, the Court being of the opinion that since the suit was not one for breach of contract under §301 it did not have jurisdiction.[11] But in *Minkoff v. Scranton Frocks, Inc.*,[12] the same Court held that, where an action is one appropriately within the purview of §301, it is removable to a Federal Court. In accord is a decision of the Federal District Court in Connecticut holding that, while an action under §301 may remain in a State Court for application of federal law, either party has the power to effect a removal since Congress pre-empted this field. *Ingraham Co. v. Local 260, IUE.*[13]

Closely related to the question whether Congress has pre-empted the area covering suits under §301 to the exclusion of the States is the question whether the NLRB may be said to have exclusive jurisdiction over matters which, although arbitrable, may also constitute an unfair labor practice. Two recent Circuit Court opinions deal with this question. In *Machinists Ass'n. v. Cameron Iron Works*,[14] the Fifth Circuit held that a Federal District Court has jurisdiction under §301 to order arbitration of a discharge grievance even though the discharge might also constitute an unfair labor practice within the exclusive jurisdiction of the NLRB. After noting that submission of a contract violation to arbitration will not affect the power of the Board to act, the Court stated:

"But certainly an award or an agreement to arbitrate may serve to temporarily assuage the aggrieved party and afford validity to

11. *Wamsutta Mills v. Pollock*, 45 LRRM 2654 (S.D.N.Y. 1960); *In re International News Service, King Features*, 41 LRRM 2639 (S.D.N.Y. 1958). But cf *New Bedford Defense Products v. Automobile Workers, Local* 1113, 41 LRRM 2850 (D. Mass. 1958), aff'd 258 F. 2d 522 (1st Cir. 1958), where Judge Wyzanski stated that §301 contemplates not only ordinary law suits for damages and equitable relief, but also proceedings under the Declaratory Judgments Act to secure declaration of legal rights under the contract.
12. 44 LRRM 2081 (S.D.N.Y. 1959).
13. 171 F. Supp. 103, 43 LRRM 2730 (D. Conn. 1959).
14. 257 F. 2d. 467, 42 LRRM 2431 (5th Cir. 1958), cert. denied, 358 U.S. 880. Accord: *Local 1055 etc. v. Gulf Power Co.* (U.S. Dist. Ct., ND Fla., 1959), 175 F. Supp. 315.

contract terms (even including unfair labor practices) until a final disposition of the matter of unfair labor practice be made by the Board. Even though the Board is not bound by an arbitration award, it may find that compliance with the award is not violative of the Act, or it may even in the exercise of its discretionary power decline action because an award has been made or arbitration is possible."

The Court thus expressed the hope that the effect of its holding might be a partial answer to the necessarily slow-moving procedures of the Board which it colorfully likened to "a wounded snake (which) has dragged its slow length along, sans bargaining, sans labor peace, sans everything but pride of opinion, ill temper and frustration."

The decision of the Tenth Circuit in *Steelworkers v. New Park Mining Co.*[15] similarly holds that the Federal Courts are not ousted of jurisdiction under §301 even though the leasing of the employer's mining operations may also constitute an unfair labor practice. The Court said that no jurisdictional conflict arises since, while the NLRB is concerned with the effectuation of the declared policies of the Act, the Court is concerned only with contract violations.

There has been a division in the courts as to whether the same may be said with respect to suits under §301 to enforce an arbitration award rendered pursuant to the AFL-CIO "no-raiding" agreement, where enforcement of the award would necessitate the withdrawal of a Union's representation petition from the Board. In the only Court of Appeals case decided to date, the Seventh Circuit has held that Federal District Courts do have jurisdiction to order such compliance with the award. *Textile Workers, UTW v. Textile Workers, TWUA.*[16] Accord, *Local 2608, Lumber Workers Union v. Local 1495, Carpenters Union.*[17]

In *Doll & Toy Workers v. Metal Polishers,*[18] however, a recent District Court decision denies such jurisdiction under §301, holding that the jurisdiction granted to the NLRB over representation disputes overrides that conferred by §301 on the Federal Courts, and that the "no-raiding" agreement cannot be permitted to oust or limit the jurisdiction of the Board in such matters.

15. 273 F. 2d. 352, 45 LRRM 2158 (10th Cir. 1959).
16. 258 F. 2d. 743, 42 LRRM 2605 (7th Cir. 1958).
17. 169 F. Supp. 765 (N.D. Cal. 1958).
18. 180 F. Supp. 280, 45 LRRM 2567 (S.D. Cal. 1960).

C. *Procedure*

In addition there have been several decisions on questions of compliance with conditions precedent to arbitration. In the *American Brass Co.* case, 272 F. 2d 849, 45 LRRM 2379 (1959), the Seventh Circuit dismissed a Union's suit to compel arbitration where it had not requested arbitration within the time limits specified in the contract. Where a contract specified no definite time limits, however, the First Circuit decided that application to the American Arbitration Association for designation of an impartial chairman of a board of arbitration must be made "within a reasonable time." Where a Union's delay was occasioned by its desire to await the outcome of arbitration on a similar grievance, and where the delay did not operate to the prejudice of the employer, the Court decided that an application for designation of the impartial chairman made 10-½ months after the grievance procedure had been exhausted was made "within a reasonable time." *Boston Mutual Life Insurance Co. v. Insurance Agents Union.*[19] A District Court in Massachusetts reached a different result in finding a Union guilty of laches, and refusing to order arbitration where a delay in pressing grievances had operated to the prejudice of the employer. *UE v. General Electric Co.*[20] In another District Court case, the Court decided that a matter is procedurally arbitrable notwithstanding that the Union's letter submitting a grievance to the plant manager was signed by the Union's secretary rather than by individual members of the Union committee as prescribed by the contract. *Operating Engineers, Local 381 v. Monsanto Chemical Co.*[21] The Court stated that "To hold that there was not a substantial compliance with the procedural requirements of Article VII would be to disregard substance and fair dealing in favor of full compliance of all technical requirements."

One decision held that an employer's contention that grievances submitted to arbitration were not processed in accordance with the contract's grievance procedure is without merit where the employer participated in the arbitration award. *Local 149, UAW v. American Brake Shoe Co.*[22]

D. *Miscellaneous*

Several recent decisions have dealt with the implications of the

19. 268 F. 2d. 556, 44 LRRM 2510 (1st Cir. 1959).
20. 172 F. Supp. 53, 43 LRRM 2827 (D. Mass. 1959).
21. 164 F. Supp. 406, 42 LRRM 2834 (W.D. Ark. 1958).
22. 45 LRRM 2437 (W.D. Va. 1959).

Supreme Court's decision in *Westinghouse*[23] in the light of *Lincoln Mills*. The Tenth Circuit's decision in *Steelworkers v. New Park Mining Co.*[24] simply follows *Westinghouse* in holding that a Union may not bring an action under §301 in a Federal Court to recover back wages or vacation pay allegedly due employees under a collective bargaining agreement, since these rights under the contract are uniquely personal to the employees.

In *Item Co. v. Newspaper Guild*,[25] the Fifth Circuit, in ordering arbitration of a grievance relating to a discharge, distinguished *Westinghouse* on the basis that the obligation to arbitrate under the contract ran to the Union and was not the same as a Union's asking the Court for direct relief on behalf of the individual. The same Court held in *Refinery Employees v. Continental Oil Co.*,[26] however, with respect to a grievance regarding failure of an employee to be assigned overtime work, that the fact that the matter was arbitrable did not give the arbitrator authority to award damages to the employee where the company had a fixed policy of not paying for work not performed. The Court, noting that the collective agreement was silent as to the remedy, if any, in the case of misassigned overtime, said that determination of such remedy, including damages, is not implicit in arbitrating grievances.[27]

Decisions in the Fourth Circuit in *Textile Workers Union of America v. Cone Mills*[28] and *Enterprise Wheel and Car Corpora-*

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23. *Westinghouse Salaried Employees v. Westinghouse Electric Corp.*, 348 U.S. 437 (1955). See Meltzer, "The Supreme Court, Congress and State Jurisdiction over Labor Relations," 59 Colum. L. Rev. pp. 269, 272 (1959).
24. 273 F. 2d. 352, 45 LRRM 2158 (10th Cir. 1959). Accord: *Upholsterers' Union v. Star Upholstery Co.*, 46 LRRM 2069, where the District Court held that the Union may not sue under §301 for recovery of damages sustained by its members and, further, that the Union cannot sue for damages for the employer's refusal to arbitrate since such damages are nebulous and not measurable in terms of dollars.
25. 256 F. 2d. 855, 42 LRRM 2360 (5th Cir. 1958).
26. 268 F. 2d. 474, 44 LRRM 2389 (5th Cir. 1959).
27. See, however, decision of Judge Wright in *IBEW v. Mississippi Valley Electric Co.*, 44 LRRM 2674 (E.D. La. 1959), holding that the Federal Court has jurisdiction to enforce an arbitration award covering unpaid wages due certain employees, and stating that the Supreme Court had "beat a retreat from *Westinghouse*" with its decision in *Lincoln Mills*. The Court distinguished *Continental Oil* on the basis that the arbitration clause there was severely limited as to the subject matter for arbitration and the Union had retained its right to strike.
28. 268 F. 2d. 920, 44 LRRM 2345 (4th Cir. 1959).

tion v. United Steelworkers of America,[29] indicate that an arbitration award is just as enforceable in the Federal Courts under §301 as is an agreement to arbitrate. The Court held that when a suit by a Union for compensation due the employees whom it represents follows an arbitration award, *Lincoln Mills* rather than *Westinghouse* controls. "The purpose of Congress to give effect to employer-union contracts would be frustrated if the Courts should decree specific performance to agreements to arbitrate but deny enforcement to arbitration awards which the parties have agreed in advance to accept. In both cases the right of action is based in the last resort on breach of contract between the parties."[30]

Similarly, the Sixth Circuit in *Oil Workers Union v. Delta Refining Co.*[31] held that the mere fact that an arbitration award may result in payment of back pay to an employee, or in his reinstatement after discharge, does not deprive the Federal courts of jurisdiction to enforce the award. However, the Court remanded the case to the District Court, there being no showing in the complaint of any terms of the contract or any obligations of the employer from which a grievance relating to a discharged employee might arise.

One important decision in the Fourth Circuit held that individual employees may not sue an employer for their alleged wrongful discharge under a collective bargaining agreement unless they can show that the Union acted arbitrarily or discriminatorily in refusing to press the grievance to arbitration. Chief Judge Thomsen of the District Court reasoned that "A Union's right to screen grievances and to press only those it concludes should be pressed is a valuable right, and on balance it benefits all employees." *Ostrofsky v. United Steelworkers.*[32]

In *Armstrong-Norwalk Corp. v. Rubber Workers,*[33] a District Court refused to stay arbitration of an employee's discharge even though the Union had struck. The employer contended that the strike in the face of a "no-strike" provision of the contract constituted a forfeiture of the Union's right to invoke arbitration of the discharge. In rejecting this contention, the Court held that the ques-

29. 269 F. 2d. 327, 44 LRRM 2349 (4th Cir. 1959).
30. *Cone Mills* case, 268 F. 2d. 920 (4th Cir. 1959), 44 LRRM at 2348-2349. See Note in 73 Harv. L. Rev. (May, 1960), at p. 1408.
31. 45 LRRM 2999 (6th Cir. 1960).
32. 273 F. 2d. 614, 45 LRRM 2486 (4th Cir. 1960), affirming *per curiam,* 171 F. Supp. 782, 43 LRRM 2744 (D. Md. 1959).
33. 167 F. Supp. 817, 43 LRRM 2098 (D. Conn. 1958).

tion whether the strike was in breach of the agreement and, if so, whether it constituted a forfeiture of the right to arbitrate, was itself arbitrable. Suit was stayed pending arbitration of that question.[34] To the same effect is *Tenney Engineering, Inc. v. U.E.*[35] However, another District Court allowed an employer's action for damages against a Union which called a strike instead of processing the grievance through the grievance machinery of the contract. The Court found that the matter would not be arbitrable in the absence of an express provision in the contract making the propriety of a strike arbitrable. *Gay's Express v. Teamsters, Local 404.*[36]

Adding to the conflict among the lower Federal Courts, the Federal District Court in Washington held that it had jurisdiction under §301 to issue a temporary injunction directing a Union to abide by the contract's grievance provisions barring work stoppages while a grievance is being processed. The Court concluded that, since it had the power to order arbitration under the contract, the Norris-LaGuardia Act would not deprive it of jursidiction to issue the injunction. *American Smelting Co. v. Smeltermen's Union.*[37]

Where suit was brought by former employees of a corporation, which had been absorbed by the defendant corporation, to set aside an arbitration award dealing with seniority, the Third Circuit held that the Union and the employees of the defendant corporation, who were beneficiaries of the award, were indispensable parties. *Nix v. Spector Freight System.*[38]

Finally, a Federal District Court in New York has held that it had no jurisdiction of a suit to compel arbitration under the Federal Arbitration Act, a question left unanswered by the Supreme Court. *Lodge 506, IAM v. General Electric Co.*[39]

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34. The Second Circuit held that no appeal would lie from the order since the suit was equitable in nature, and the order granting a stay, since not a denial of the full relief sought, was not a final order. 269 F. 2d 618, 44 LRRM 2472 (2d Cir. 1959). Cf. Judge Wyzanski's opinion in the *New Bedford Defense Products* case, f.n. 11 *supra.*
35. 44 LRRM 2422 (D. N.J. 1959).
36. 43 LRRM 2518 (D. Mass. 1959).
37. 175 F. Supp. 750, 44 LRRM 2839 (S.D. Wash., W.D. 1959).
38. 264 F. 2d 875, 43 LRRM 2551 (3d Cir. 1959).
39. 44 LRRM 2695 (N.D.N.Y. 1959).

PATENT ARBITRATION

by Albert S. Davis, Jr.*

In introducing the recent hearings before the Subcommittee on Patents, Trademarks and Copyrights of the Senate Judiciary Committee, Senator Joseph C. O'Mahoney remarked that "the central patent issue seems to be that of the relation of the individual inventor and the business concern which puts inventions on the market."[1] Going a step further, he listed some more specific headings. Among these were:[2]

> "Fourth . . . the cost of obtaining patents and of patent litigation. What is the effect of these costs upon inventors and industry? How can they be reduced consistent with maintaining a sound patent system?
>
> "Fifth . . . apart from financial costs, how adequate are our present court procedures both in terms of the time it takes to reach decisions and in terms of the correctness of those decisions? Are our courts equipped to handle the complex technical subjects involved in patent litigation; do they need the benefit of consultation with independent experts; or do we need special courts to handle patent matters?"

By no means all of our problems in patent work offer any opportunity whatever for arbitration techniques. Much of the delay complained of, for instance, is in the *ex parte* phase of patent prosecution, where the opponent is the Patent Office's examiner or, at a litigation level, the Solicitor for the Patent Office. To the extent attorney's total fees are high because of high per diem charges, arbitration cannot help; but to the extent the high total is due to long-drawn-out suits, it can.

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1. *American Patent System*: 1956 Hearings before . . . Subcommittee on Patents . . . , Committee on the Judiciary, Senate, 84th Congress, 1st Sess., on S.Res.92 (herein "O'Mahoney Hearings") p. 2.
2. O'Mahoney Hearings, p. 3.

Perhaps we need first, then, a short definition of the field where the use of arbitration should be considered. Actually, patent law is not nearly as narrow a specialty as you might think. A distinguished patent lawyer once unburdened himself on the question of his specialty as follows:[3]

> "A patent is a contract. Its infringement is a tort, the prosecution of which penetrates every nook and cranny in the field of jurisprudence. In such a case questions frequently arise—and I am referring only to matters that have arisen under my own personal cases here—concerning unfair competition, trade marks, trade names, copyrights, assignments, title, contracts, license, mortgage, pledge, receiverships, bankruptcy, insolvency, negotiable instruments, partnerships, corporations, statutes (State and Federal), constitutions, international law, treatise, trusts, evidence, descent, succession, inheritance, specific performance, rules of practice, jurisdiction, law and equity pleading and procedure, jury trials, directed verdicts, estoppels, laches, injunctions, contempt of court, forgery, perjury, accounting of profits and damages and the method of arriving at each, costs, ascertainment of value of goodwill, proof of lost and disputed documents, taxation (State and Federal), declaratory judgments, monopoly under Sherman and Clayton Acts (involving both civil and criminal liability), and interstate commerce."

We know that, except where the government is a party to the proceedings, a contentious matter in any of these fields can be handled in arbitration. Why should they be?

I suggest that the answer does not lie so much in the subject-matter as in the broad nature of the problems the patent lawyer faces.

One of these problems, delay, is no different from that facing any other lawyer whose practice lies heavily in the Federal courts. What is the situation in the Southern District of New York?

To begin with, we have an extraordinary case load here. For the fiscal year ending June 30, 1958, there were 10,399 civil cases pending; a year later, 10,937.[4] 6,549 new cases were commenced in 1958-

3. Statement of Wallace R. Lane, in *Court of Patent Appeals*: 1937 Hearings before . . . Committee on Patents, Senate, 75th Congress, 1st Sess., on S.Res.475 (herein "McAdoo Hearings"), p. 25.
4. Annual Report of the Director of the Administrative Office of the United States Courts, 1958-59 (herein "Report"), Table C-1.
5. Report, Table C-3.

1959.[5] In 1958 there were filed 374 civil cases per judge; a year later, 364.[6]

How heavy is the impact of patent cases? 105 of them were commenced in 1958-59, and this includes only infringement suits; the figure does not include suits for breach of license, construction of license, declaratory judgment of invalidity or non-infringement, or other types of patent litigation.[7] 237 infringement suits were pending on June 30, 1959.[8] There were 18 judges to try them, plus some borrowed from other Federal benches to relieve the load.

Patent cases are notoriously lengthy to try, and the practice of taking evidence by deposition and referring cases to special masters does nothing to cut down the time. No figures are available on the average length of time needed in which to try a patent case, but the statistics on civil litigation generally in the Southern District show this:

Time interval from filing to deposition of civil cases tried in the year ending June 30, 1959.[9]

	Total	Less than 6 mo.	6 to 12 mo.	1 to 2 yr.	2 yr. plus	% under 1 yr.	Median
Total	288	4	12	103	169	5.6	26.7
Non-jury	167	2	8	50	107	6.	29.3
Jury	121	2	4	53	62	5.	24.1

In addition to this general condition of crowded dockets and lengthy trials, patent litigation (to the extent that it involves the validity of a patent) permits repetition of a contest of the same issues. An infringement suit is not a proceeding *in rem*. Such a suit is thus substantially identically repeated, with the same or different parties, in two or more Circuits, until one party or the other runs out of money or courts. This multiplies delays.[10]

6. Report, Table C-3.
7. Personal communication, April 19, 1960, from Chief, Division of Procedural Study and Statistics.
8. Report, Table C-3a.
9. Report, Table C-5.
10. *Cf.* for instance the Jungersen litigation, capped by Jungersen v. Ostby & Barton Co., Jungersen v. Baden, 335 U.S. 560, 80 U.S.P.Q. 32 (1949), and Jungersen v. Axel Bros. Inc., 121 F. Supp. 712, 101 U.S.P.Q. 214 (U.S.D.C.S.D.N.Y., 1954), aff'd. 217 F. 2d 646, 104 U.S.P.Q. 39 (C.A.2, 1954), cert. den. 349 U.S. 940, 105 U.S.P.Q. 517 (1955-memo). Here after at least three consent and two litigated judgments of validity and infringement, and another litigated judgment of partial validity, the patent was dragged down after 10 years of litigation. See also statement of Thoger Jungersen, O'Mahoney Hearings, pp. 210-213, 299-302; compare statement of Wallace R. Lane, McAdoo Hearings, pp. 23-24.

A reasonable man might draw several conclusions from these figures, one of which would be that the Federal bench is doing a remarkable job under handicapped conditions.[11] The amount of civil litigation pending is entirely out of proportion to the number of judges, the time they have available for trial work, and the proper dispensation of justice. Thirteen infringement suits per year per judge is the best possible illustration of this, assuming we cling to the idea of getting all litigation disposed of in one year from the time it is instituted. Adding other patent litigation to the infringement cases underlines the point. A median time of 29.3 months to dispose of a non-jury case is an imposition on the court and the litigant alike.

Would arbitration offer any different picture, in terms of disposing of its case-load? It is not enough to say that the available panel of arbitrators (9600 in the United States, 3570 of whom are in New York) is far in excess of the number of judges, for no arbitrator would be willing to serve continuously or anything like it. Moreover, challenges to the panel under the American Arbitration Association's Rules,[12] and the careful stricture on disqualification for favor and the like,[13] reduce the panels available. Finally, by no means a majority of the arbitrators who have been registered by the Association are competent to handle patent arbitrations. Obviously, however, there are many more than 18 of them who are ready, willing, able and competent factually and legally at any one time. The case load problem is not nearly so severe.

How long does it take to try an arbitration? As with the statistics on judicial trial, we have no separate figures for patent cases alone. On commercial cases generally, however, we have this showing of the time taken from the initiation of the proceeding to rendering of the award.[14]

Now part of this can be explained away, of course. It can be argued, for instance, that the more difficult cases go to court rather than arbitration. The fact remains, however, that the disparity in length of time taken to dispose of a disputed matter is so extreme that it is impossible to explain it away completely.

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11. Ryan, J., *Disposition of Judicial Business,* 24 Fed. Rules Dec. (#6) 373 (Jan. 1960).
12. Sec. 18 of the Commercial Arbitration Rules.
13. Civ. Prac. Act 1462. For the most recent patent-subject case see Rogers, Attorney General v. Schering Corp., Third Circuit Court of Appeals, November 5, 1959, digested in *Arb. J.* 1960 p. 106.
14. Personal communication from Morris Stone, Editorial Director, American Arbitration Association, April 6, 1960.

Time duration for closing cases in AAA Commercial Arbitration Tribunal. Source: A 1134 case sample studied by AAA Research Department.

Time Duration (in months)	Number of Cases	Approximate Percentage of Total
1 or under	21	2
1-2	191	17
2-3	247	22
3-4	215	19
4-5	135	12
5-6	104	9
6-7	55	5
7-8	47	4
8-9	29	3
9-10	22	2
10-11	15	1
11-12	15	1
12 and over	38	3
	Total 1134	

Only 3 per cent (3.35%) of these cases went 12 months or more to reach a final decision. In contrast, 157 of 167 court-tried non-jury cases were in the court a year or more. The median for final disposition in the trial courts was 29.3 months; the arbitration median was 3 to 4 months.

Again, it can be said, with perfect truth, that the total number of cases disposed of by the American Arbitration Association is much smaller than that handled in the courts. In 1957 it was 652, not including accident tribunal cases, in 1958—711, in 1959—705.[15] The arbitration tribunals show tremendous capacity to increase their case load, however. The relatively new Accident Claims Tribunal handled 384 cases in 1958 and 465 in 1959.[16] Again, in a single year recently the insurance companies resolved among themselves by inter-company arbitration 14,261 cases which would have taken the courts eight years to handle, assuming that parties, counsel, witnesses

15. *Id.*, and *Arb. News* No. 3, 1959, p. 2-3.
16. *Ibid.*

and jurors were all available and the cases were disposed of at the rate of one per hour.[17]

This ability to dispose of contested matters rapidly, where the courts have been clogged, is not confined to tort matters. Indeed, in Pennsylvania, where arbitration has been made virtually compulsory for small matters, an entire literature has grown up around the relief given to the courts and litigants alike.[18]

A factor in this delay, though far more important in its own right as a recommendation for arbitration, is the necessity for unusual *expertise* in many patent cases. Not all patent cases, of course, require a judge to become even moderately familiar with nuclear physics, rheology, or production of steroids by fermentation process. A "patent case" may well turn on nothing more technical than title to patents[19] or the area in which a license is to be effective.[20] Such problems are the stuff with which commercial arbitration deals every day. What case is there for expertness on the part of the "decider"?

Such expertness is of two kinds, expertness in patent law and expertness in science and technology. It is the latter which creates the problem. The argument for a court skilled in patent law has been argued pro and con for many years.[21] One side deplores the dangers of narrow specialization.

> "I am not going to dwell on my views as to specialized courts. I don't like them, I don't believe in them. I do want to protest that patent law is not a black art, there is nothing highly mysterious about it. It is true that certain men with a desire for that particular kind of case gravitate into it and specialize in it,

17. *Arb. News* No. 1, 1960, at 2; see the impressive comparison on delay in *Arb. News* No. 8, 1958, at 3; see also R. J. Demer, "270 Insurance Companies Arbitrate Intercompany Claims," 42 *J. Am. Jud. Soc.* 92 (1958); E. M. Fuller, "Extra-Judicial Settlement of Insurance Claims," 1956 *Ins. L.J.* 816; J. N. Braden, "Use of Arbitration in Settling Insurance Claims," 1956 *Ins. L.J.* 15.
18. Institute of Judicial Administration, *Compulsory Arbitration and Court Congestion, The Pennsylvania Compulsory Arbitration Statute, Delay and Congestion, Suggested Remedies Series No.* 11 (July 1, 1956); . . . Supplement, . . . Serial No. 16, p. 41 (August 15, 1959).
19. See e.g. Nelson v. Swing-A-Way Mfg. Co., 266 F. 2d 184, 121 U.S.P.Q. 290 (C.A.8, 1959).
20. See *e.g.* Scapa Dryers, Inc. v. Abney Mills, 269 F. 2d 6, 122 U.S.P.Q. 118 (C.A. 5, 1959); cert. den. 361 U.S. 901, 123 U.S.P.Q. 589 (1959-memo.).
21. See generally McAdoo Hearings.

just as other men specialize in tax matters, and so forth, but I don't believe that is any valid reason for having a specialized court, and I don't like the idea of patent lawyers being set apart, for they are likely to find themselves subject to the same criticism that tax lawyers are finding themselves subject to."[22]

The other emphasizes the technicalities of patent law as a branch of jurisprudence—for instance, the extraordinary need for corroboration of the inventor's testimony, or the mutual non-accountability of joint patentees.

The modern tendency, however, is toward specialization. On the Federal level we have not only the Court of Customs and Patent Appeals and the United States Tax Court, but courts such as the Court of Military Appeals, and the numerous administrative tribunals. On the state level, particular courts for such matters as probate, marital matters, juvenile offenders and criminal cases argue for the special jurisdiction.

The question is not really one of expert knowledge of patent law, but of ready ability to understand, absorb and handle peculiarly difficult facts:

"Now, the second point that causes industry to favor this bill is that it believes that the decisions of this new court will not only be more consistent but also more accurate. I believe that it is the almost unanimous opinion of the scientific and technical professions that this court should be so constituted that it will be able to understand technical questions and be able to analyse them correctly. Otherwise, I don't see how complicated patent cases can possibly be correctly decided.

"The number of patent cases involving technical questions is large, and this number is rapidly increasing. As the art becomes more complicated the patent cases are bound to become more technical. It is, to say the least, disconcerting to read over decisions, for instance in chemistry, so often where you find the courts in their decisions have made various slips in chemical technology, showing that the court may never have grasped the technical point involved. That is not at all strange under our present court system, and it is my opinion that if this bill should pass and should provide for a single court without at the same time providing that this court shall be able to understand technical questions, only half of the problem will be solved.

22. Statement of Walter J. Blenko, McAdoo Hearings, p. 75.

"Senator Bone. The only qualifications the bill has is a special aptitude in the practice or administration of the patent law. That does not imply anything beyond those words, which are simple and readily understandable."[23]

Or as Judge Learned Hand put it in a somewhat different context:

"The lawyers are very expert in predigesting the food for the infantile judicial stomach, so that we get an awful lot. The good ones are perfectly wonderful. But even so, if you have a controversy of fact about intricacies in chemistry or physics, electricity, too—they do get more and more difficult all of the while —you must have some help of that sort. A college education at least."[24]

Consider for a moment the process by which a board of three arbitrators is selected through the American Arbitration Association for a given case. To begin with, when each individual arbitrator qualified as a member of the Association's National Panel he advised the Association not only as to his principal professional or business activity, but as to the field or fields in which he felt best qualified to serve. When the case is ready for arbitration, a panel of 20 is selected, based on a search of arbitrators' names card-indexed by those qualifications.[25] The panel is normally broadly representative of the technology and the business involved. Granting that the striking-off by the parties of unwanted names on one or more successive panel lists may very occasionally produce a board of three arbitrators, no one of whom is an adept in the *particular* technology involved, one or more of them will almost always have had fundamental training easily adaptable to the technical demands of the individual case.

Finally there is the problem of expense. Judges, patent lawyers and litigants alike deprecate it. All litigation is expensive, of course, but in the patent field this is compounded by the need of a specialist bar and the long duration, not to say prolixity, of many cases. Anything which can be done to simplify proofs, to get at the facts more efficiently and quickly and to shorten the procedures and the time between complaint served and a judgment which can no longer be appealed is well worth a try. The statistics demonstrate the high probability that arbitration can do this.

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23. Colloquy of Henry C. Parker and Senator Homer T. Bone, McAdoo Hearings, p. 95.
24. O'Mahoney Hearings, p. 133.
25. *Arb. News* No. 4, 1960, p. 2, col. 1.

How often *is* arbitration resorted to in patent matters? Unfortunately no complete figures are available. A research report prepared for the internal use of the American Arbitration Association, however, showed that 36 of a sample of 1134 "typical" cases (or about 3%) dealt with patents, trademarks, copyrights, "confidential disclosure", or intellectual property.[26] Whether this is reflective of the broad general or Federal pattern of litigation cannot be factually determined.[27]

The real question, however, is why patent matters are not more frequently brought to arbitration. The reasons seem to be subjective rather than objective.

To begin with, the key to patent practice is almost always admission to the Patent Office bar, which in a substantial percentage of cases follows a period of employment in the Patent Office as an examiner.[28] The practice in the Patent Office, passing far beyond its Rules, is probably the most complicated of any administrative tribunal.[29] Accordingly the patent lawyer trains as a specialist in the complex law of obtaining patents, continues to think along those lines, and carries this feeling into his *general* patent practice when he leaves the Patent Office.[30] Because of this, he tends to feel that arbitration, not bound by precedent, not dependent on the formal rules of evidence, and conducted informally, would be a very strange garret for a lonesome cat. Since the reasoned results of arbitration are not published in opinion form (though the factual result is invariably disclosed shortly by one or the other of the parties), he feels that he has no reference materials to guide him in his conduct of his client's case in arbitration.

Now a great deal of this feeling is based upon misapprehension. We who are concerned with arbitration, for instance, know that it is more than a play on words to say that a case which would be bound by precedent creates its own precedent. To put it another way, arbitration considers the law, if the arbitrant has done even a halfway job of picking his panel, but it also looks constantly and sharply at the facts, and facts have a habit of controlling most judicial

26. *Supra* note 14.
27. Text, *supra* notes 3, 7.
28. Statement of Commissioner R. C. Watson, O'Mahoney Hearings, p. 171-172, 198-199, Table p. 200.
29. See *Manual of Patent Office Examining Procedure* (Dept. Comm., U.S. Patent Office—1953, supplemented and revised).
30. Contrast A. S. Davis, Jr. and H. T. Stowell, "The Patent Profession and the General Lawyer", 13 *Law and Cont. Probl.* 310 (1948).

decisions. We also know that the reasons behind a rule of evidence, the requirement that an inventor's testimony be corroborated, or the hearsay rules, for instance, impel the same reception, weighing, and exclusion or admission of evidence which would obtain in court.

Probably what is needed here is more understanding by lawyers of the fact that skilled arbitrators have definite standards by which they approach the hearing and determination of a contested issue. As an example, the 15th and 17th Standards, which are binding on American Arbitration Association panels, should contribute something to reassure trial attorneys:[31]

> "15. Pertinent and material evidence. Refusal of the arbitrator to hear all pertinent and material evidence constitutes misconduct. It is preferable to admit more rather than less evidence so as to avoid giving ground for an allegation of bias.
>
> "17. Cross-examination. As the purpose of cross-examination is to clarify the facts, detect mistakes, correct mistatements and elicit full information, it is the duty of the arbitrator to see that such cross-examination is fair and that witnesses are not intimidated, but receive courtesy, respect and encouragement in presenting their testimony."

Perhaps equally cogent a worry is that the unavailability of appeal, as commonly understood, from arbitration is apt to leave the arbitrant with an unjust result and no method of redress. It is not a sufficient automatic answer, subjectively, to say that few lawsuits are entered into on consideration of appellate prospects, because the lawyer who feels this way also feels that an arbitration is apt to turn out unjustly, in any event, and this makes him want the right to appeal even more strongly.

As with the worry about informality, the solution here must be a gradual one. There must be more and better education of the bar, until it becomes increasingly aware that, just as arbitration is not informal to an undesirable extent, its results are not presumptively wrong. This education, however, cannot rest on articles praising the arbitration process, or even on moot arbitration proceedings conducted as seminars. What is needed is more word-of-mouth talk of successful arbitrations, successful in two senses—first, that the lawyer feels, *win or lose,* that his client had a fair, thorough and reasoned

31. F. Kellor, "Standards of Practice for Arbitration," 4 *Arb. J.* (N.S.) 46, 49 (1949), and see the helpful, and more critical, article by R. Abelow, "Standards of Evidence in Arbitration Proceedings," 4 *Arb. J.* (N.S.) 252 (1949).

hearing; second, that his client agrees with this, and is gratified by celerity of hearing and the resulting economy.

Third, some patent contentions involve the validity of the patents involved—a claim of infringement is the most obvious example. Here the lawyer who argues for invalidity is more likely than not to feel that the courts will be less friendly to any patent than arbitrators would be. Unofficial statistics for the years 1948-52 inclusive, for instance, showed that in the circuits the percentage of infringement cases where the plaintiff prevailed, that is, where he proved both validity and infringement, was:

1st—11%	6th—18%
2nd—3%	7th—16%
3rd—8%	8th—10%
4th—42%	9th—28%
5th—50%	10th—25%

Broken down as to invalidity, the figures for the Second Circuit for 1948-52 were:

	U.S.D.C. S.D.N.Y.	All D.C.'s 2d Circ.	C.A. 2d
Patents involved	47	84	35
Valid and infringed	24	39	1
Invalid	19	32	27
Not infringed	4	13	7

It is probably correct to say that the record for patents has improved somewhat over the past eight years. In addition the percentile figures will change very sharply from year to year in those circuits where there is relatively less infringement litigation. The hard fact remains that one venturing into district court with a patent usually has less than an even chance that it will be held valid.[32] The explanations of this are multiform, ranging from mild assertions that only bad patents must be taken to court to explosive claims that the courts are unsympathetic to the patent system.[33]

If the lawyer who should or must argue invalidity of a patent to win his case is correct in thinking courts find invalidity more readily than boards of arbitration, it will be most difficult to persuade

32. There is also a constant exposure to the burgeoning doctrine of misuse, as to which the same arguments apply.

33. See the reasoned discussion of G. W. Arnold, O'Mahoney Hearings, p. 246.

him to accept arbitration. Perhaps the only argument for it would be consideration of the long-term effect, on the patent system in general, of repeated judgments of invalidity. Few clients are so public-spirited. But aside from the fact that a board of arbitration dealing with a patent matter is apt to have a patent lawyer or practical patent man on it (and a violent assumption that they would be more favorable to patents than "those judges"), there is no reason to believe that patents would be more tenderly treated in arbitration.

Be that as it may, there is plenty of patent-stuff not involving the issue of validity which may usefully employ arbitration—resolution of otherwise time-consuming interferences, enforcement or interpretation of royalty contracts and licenses, and disputes over ownership, to pick case-types at random.[34]

Such subject matter points up one other special advantage of arbitration—its privacy. A licensor and licensee who are at loggerheads over the construction of a license may well prefer not to spread its terms—for instance, the royalty rate and base—in court records or public testimony for the benefit of unlicensed competitors. This is particularly true where the royalty impact is based on such trade quasi-secrets as savings during manufacture, production costs, or dollars per unit, or where a licensee's discounts to specific customers are called into question. Where a company wishes to secure title to patent rights from a disgruntled ex-employee the value of privacy is also plain.

Unquestionably arbitration is and can be of help in the broad field of patents, as it has in so many other fields.

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34. See generally A. S. Davis, Jr., "Patent Arbitration-A Modest Proposal," 10 *Arb. J.* (N.S.) 31 (1955); "Patent Arbitration and Public Policy," 10 *Arb. J.* (N.S.) 87 (1957).

CORRESPONDENCE

Industrial Engineers as Labor Arbitrators

To the editor:

The participation of two industrial engineers in the 1959 management-labor dispute in the basic steel industry exemplifies an interesting development in the contribution that this branch of the engineering profession is beginning to make to the field of labor arbitration. R. Conrad Cooper, Executive Vice President, United States Steel Corporation, who represented management, is an industrial engineer. Dr. Paul M. Lehoczky, who served as one of the fact-finders, is Professor and Chairman of Industrial Engineering at Ohio State University.

Practically everything that an industrial engineer does is subject to the bargaining process. He is taught and conditioned to be keenly aware of the provisions in the contract with the union that limit or control his plans and designs. To do his job effectively he must not only be management-conscious but employee-conscious. He is trained to be cognizant of employee suspicions, complaints and grievances, and aware of the expense of shutdowns and turnover. Although trained for management, the industrial engineer must have a sincere appreciation of labor's interests. He is also found in union employment. In short, the successful industrial engineer knows that often there are three sides to every question: management's side, the worker's side and the right side.

Industrial engineering is the application of engineering methods and the principles of scientific management to production. It is concerned with the design, improvement, and installation of integrated systems of men, materials and equipment. It draws upon specialized knowledge and skills in the mathematical, physical and social sciences, together with the principles and methods of engineering analysis and design to specify, predict, and evaluate the results to be obtained from such system. From this definition officially adopted by the American Institute of Industrial Engineers, it is easy to imagine that about everything that an industrial engineer does is subject to bargaining which may result in arbitration.

Inasmuch as industrial engineers design and maintain the work place and its environment, they must perform their work with the expectation of having to sell it to the union. A good salesman understands the unfavorable features as well as those that are favorable to his product.

There is still considerable suspicion of industrial engineers on the part of labor because of the unsavory reputation built by their predecessors who were known as "efficiency engineers." Developments since World War II eliminated the ignorant ruthlessness of the Nineteen Twenties and Thirties. Efficiency engineers were not only hard on labor but they put many employers out of business in those days. The task of developing industrial engineering into an accredited and recognized branch of the engineering profession requires a far broader knowledge and application of basic principles, many of which are comparatively new. In this effort, we have developed the new science of ergonomics or "human engineering." Industrial engineers have had to live down a bad reputation.

Actually, industrial engineering has extended the concern and responsibility of the engineering profession beyond that of design and construction into the areas of manufacturing-production, servicing and end use. We are concerned with questions of whether or not engineers are designing beyond the capabilities and capacities of the workers as well as the intelligence of the user and consumer of engineered products.

An engineer trained and experienced in current industrial-engineering practice should be perfectly capable of impartially arbitrating disputes over standards for performance in quality, quantity and cost. Also within his scope are matters that involve job or task design, determining the most economical way to do the work, and establishing and maintaining incentive systems. All of these matters are subjects for contract negotiation and, of course, arbitration. The industrial engineer has the technical knowledge in these matters that others do not. Use of an expert can save time in arbitrating and insure clarity of decision.

This brings us to the primary reason for writing this letter to *The Arbitration Journal.* That reason is to call attention to a large untapped supply of men and women whose basic education is well suited for further training as arbitrators. This new source of supply actually has become available only since World War II. Engineering schools are now graduating industrial engineers indoctrinated

with the fundamentals necessary to perform satisfactorily and effectively as impartial arbitrators. They are capable of contributions to the service that those trained for the legal profession are seldom aware of. However, because of the historical reputation acquired, many unions still shy away from employing the services of industrial engineers as arbitrators. This has resulted in too few of this branch of the engineering profession acquiring the proper experience.

Most of the arbitration talent available today in the field of management-labor relations appears to be personnel originally trained by the old War Labor Board. This talent is retiring at a gradually increasing rate. The insistence on the part of both management and union for arbitrators with experience and a record to look at creates unique problems in interesting and training a younger generation of arbitrators. All a newcomer has to do is to make one mistake, or inspire one unfavorable report, and he gets no further business.

Engineering schools are graduating industrial engineers whose training especially qualifies them to serve as impartial arbitrators in production and wage disputes and those involving working conditions. I do not suggest that industrial engineers are especially qualified to handle disciplinary cases. However, this branch of the engineering profession does provide a source of personnel that have acquired the fundamentals of management-labor relations. They have the education and training. Opportunities to acquire experience without undue expense and hardship will do much for the progressive advancement of labor arbitration. New blood and new thinking contributed by a profession that is comparatively new should be of benefit to labor arbitration.

Fargo, N. D. COL. MARION B. RICHARDSON

Constitutional History of Arbitration

To the editor:

There was an error in my article "A Constitutional Guarantee of Arbitration" (*The Arbitration Journal,* Volume 14, Number 3) which I would now like to correct. I had written that the Cadiz Constitution of 1812 included a guarantee of private arbitration and that this provision was probably unique in the history of constitutional law. I have since discovered an earlier reference.

Chapter V, Article 5, of the French Constitution of 1791 provided: "The right of citizens definitively to terminate their controversies by arbitrations cannot be taken away by any act of the legislative power." And the Constitution of 1793 provided: "Article 86: No encroachment can be made upon the right of citizens to have their matters in dispute decided by arbitrators of their own choice. Article 87: The decision of these arbitrators is final, unless the citizens have reserved the right of protesting." (The translations are by Lockwood: Constitutional History of France, 1890).

The quoted articles were probably the immediate source of the articles in the Cadiz Constitution, for they were readily acceptable in view of the long traditions of arbitration in Spain.

New York, N. Y. PHANOR J. EDER

READINGS IN ARBITRATION

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Application of Federal Arbitration Act to Diversity Jurisdiction Cases —Constitutional Implications, 34 Tulane L. Rev. 831-837 (1960).

Arbitration Act Creates Substantive Law Governing Validity and Interpretation of Arbitration Clauses, 73 Harv. L. Rev. 1382-1386 (1960).

Fraudulent Inducement Held Arbitrable under U.S. Arbitration Act in Diversity Suit on Contract Evidencing Interstate Commercial Transaction, 108 U. of Pa. L. Rev. 915-924 (1960).

Interpretation of the Federal Arbitration Act of 1925, 33 Temple L. Q. 352-355 (1960).

United States Arbitration Act Held to Create Federal Substantive Law Applicable in both State and Federal Courts, 60 Columbia L. Rev. 227-232 (1960).

Validity and Interpretation of Arbitration Clause in Contract Involving Interstate Commerce a Matter of Federal Law: Separability of Arbitration Clause as a Matter of Federal Law, 45 Cornell L. Q. 795-804 (1960).

(On *Staklinski v. Pyramid Electric Co.*, 6 N.Y. 2d 159)

Arbitration—Specific Performance of Employment Contract, 9 Buffalo L. Rev. 219-222 (1959).

Grounds for Vacating Award: Specific Performance of Personal Service Contract, 7 U. of Calif. Los Angeles L. Rev. 507-571 (1960).

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REVIEW OF COURT DECISIONS

THIS review covers decisions in civil, commercial and labor-management cases, arranged under six headings: I. *The Arbitration Clause,* II. *The Arbitrable Issue,* III. *The Enforcement of Arbitration Agreements,* IV. *The Arbitrator,* V. *The Proceedings,* VI. *The Award.*

I. THE ARBITRATION CLAUSE

NEVADA SUPREME COURT UPHOLDS AGREEMENT TO ARBITRATE FUTURE DISPUTES although Nevada has not enacted any modern arbitration statute and the common law of that state is to the effect that such agreements are revocable at the will of either party prior to the award being rendered. Said the court: "We are . . . entirely at liberty to consider the uncertain and questionable origin of the common-law rule, the apparent reason behind the rule, the conditions under which the rule was originally enunciated, the question whether those conditions presently exist in this State, whether the original reason or basis for the rule was valid and finally whether we should or should not adopt or reject the rule as applicable or inapplicable to present conditions. . . . No one can question the vast change since those days or the vast difference in conditions now existing in Nevada. . . . We should be gravely at fault if we felt that our hands were tied by a common-law rule enunciated 350 years ago, of doubtful justification even then and of confused and uncertain interpretation ever since." *United Assoc. of Journeymen & Apprentices of the Plumbing & Pipe Fitting Industry of the U.S. and Canada, AFL-CIO v. Stine,* 351 P. 2d 965 (Sup. Ct. Nevada, Badt, J.).

AGREEMENT TO ARBITRATE MUST BE SUPPORTED BY UNEQUIVOCAL CONSENT IN WRITING. Where the relationship between the parties is governed by a uniform deed and in addition by separate by-laws of a membership association, there is not sufficient intent to arbitrate where the deed mandates membership in the association and the arbitration agreement is contained only in the association's by-laws. The court specifically said, however, ". . . one does not reach the question whether a membership association may provide for arbitration with respect to its affairs by a vote merely sufficient to amend its by-laws. Thus too, it may be that the arbitration provision in question is valid for the determination of any dispute which does not involve a construction of the uniform deed." The holding reverses the decision of the Supreme Court (digested in *Arb. J.* 1960, p. 98). *Mandel v. Hollowbrook Lake Ass'n,* 11 App. Div. 2d 652, 201 N.Y.S. 2d 620 (First Dept.).

CONTRACT PROVIDING THAT VICE PRESIDENT'S EMPLOYMENT WAS TO CONTINUE UNTIL HE "VOLUNTARILY LEAVES THE EMPLOY OR DIES" DID NOT MAKE THE CONTRACT ILLUSORY OR JUST AN AGREEMENT TERMINABLE AT WILL, SO AS TO TERMINATE THE ARBITRATION CLAUSE. Said the majority of the Appellate Division, in affirming an order denying a stay of arbitration: "All questions as to the alleged termination of the contract by discharge or resignation, or the continued existence of the contract are for determination by the arbitrators under the arbitration clause of the agreement." *Exercycle Corp. v. Maratta,* 11 App. Div. 2d 677, 201 N.Y.S. 2d 885 (First Dept.).

OKLAHOMA SUPREME COURT HOLDS THAT AGREEMENTS TO ARBITRATE FUTURE CONTROVERSIES WHICH MAY ARISE UNDER AN INSURANCE CONTRACT PROVIDING PROTECTION AGAINST UNINSURED MOTORISTS ARE UNENFORCEABLE, since only common law arbitration governs in that state and, moreover, Title 15 Oklahoma Statutes 1951 § 216 provides: "Every stipulation or condition in a contract, by which any party is restricted from enforcing his rights under the contract by the usual legal proceedings in the ordinary tribunals, * * * is void." *Boughton v. Farmers Insurance Exchange,* Supreme Court, Oklahoma, No. 38579, June 28, 1960, The Journal vol. 31 p. 1260, Irwin, J.

CORPORATION WHICH IS NOT A PARTY TO COLLECTIVE BARGAINING AGREEMENT CANNOT BE COMPELLED TO ARBITRATE. A partnership had been a party to a collective bargaining agreement containing an arbitration clause. The partnership was dissolved and the assets distributed among the principals, who then formed a corporation. The latter never became a party to any collective bargaining agreement. "Regardless of possible individual liability on the part of the two principals who formed the corporation, it cannot be compelled to arbitrate in the absence of the existence of an agreement to do so." *Reif (as Pres. of Local 169, Amal. Clothing Workers of America) v. Williams Sportswear, Inc.,* 10 App. Div. 2d 937, 200 N.Y.S. 2d 813 (First Dept.).

PROMISE TO EXECUTE, WITHIN 30 DAYS, COLLECTIVE BARGAINING AGREEMENT WHICH WOULD CONTAIN AN ARBITRATION CLAUSE IS NOT SUFFICIENT TO CREATE A BINDING AGREEMENT TO ARBITRATE. A company entered into an agreement with the union providing that the parties would enter into a full-length collective bargaining agreement similar to other union contracts with this industry generally. No such later agreement was ever entered into. Concerning the union's demand for arbitration, the court said: ". . . the union was seeking arbitration under a collective agreement that was never consummated. That unexecuted agreement was to contain the provisions for the machinery of arbitration. Without such a binding collective agreement, there was no effective commitment by the parties to arbitrate." The Appellate Division, in reversing, granted the motion to stay arbitration. *Luggage Workers Union, Local 60, ILGP & NWU v. Major Moulders, Inc.,* 11 App. Div. 2d 668 (First Dept.).

TRADE ASSOCIATION RULES CONTAINING ARBITRATION CLAUSES ARE BINDING ON MEMBERS. Confirmation of an award was challenged because of lack of consent to the arbitral forum. Both parties belonged to clothing manufacturers associations which have agreements for arbitration of all disputes among their members. Though this fact was not disputed, petitioner claimed it had no knowledge of the arbitration agreement at the time it joined the respective association. The court said: "This fact has no significance and fails to raise any issue as to the existence of a contract to arbitrate." *Nellemann v. Spartan Sportswear, Inc.,* 201 N.Y.S. 2d 52 (Steuer, J.).

ARBITRATION AGREEMENT NOT BINDING ON PARTY UNLESS HE ACCEPTED IT. In an action to recover a balance due for rental of machinery, the Appellate Division affirmed an order of the Special Term denying appellant's motion for a stay of court action pending arbitration. Said the court: "The Special Term found, after a hearing, that appellant had never accepted the arbitration clause printed on the reverse side of the rental agreements sent by respondent to appellant, despite the receipt and retention thereof without objection by appellant." *Flaherty Co. v. Lizza & Sons,* 10 App. Div. 2d 854 (Second Dept.).

CONTRACT CALLING FOR ARBITRATION PURSUANT TO THE WORTH STREET RULES IS NOT SUFFICIENT TO BIND PARTIES TO ARBITRATION. Said the court: "While the parties have attempted to deal with the subject of arbitration, their agreement has been imperfectly executed since the Worth Street Rules by mere reference thereto do not provide for arbitration and the incorporation of the Worth Street Rules cannot be said to bind the parties to any agreement to arbitrate in a particular manner." *C. G. Trading Corp. v. Sun-Fast Textiles, Inc.,* 201 N.Y.S. 2d 883 (Saypol, J.).

RECEIPT AND RETENTION OF CONTRACT FORM INCLUDING AN AGREEMENT TO ARBITRATE, WITHOUT ANYTHING MORE, WOULD NOT BE SUFFICIENT TO COMPEL ARBITRATION. The Court of Appeals affirmed without opinion an order of the Appellate Division, 9 App. Div. 2d 741, 192 N.Y.S. 2d 655 (First Dept., 1959), which had affirmed per curiam the findings of the lower court, 16 Misc. 2d 152, 182 N.Y.S. 2d 979 (digested in *Arb. J.* 1959, p. 33). *Garrett Corp. v. Frank Ix & Sons New York Corp.,* 8 N.Y. 2d 819.

II. THE ARBITRABLE ISSUE

DISTRIBUTION OF PARTNERSHIP ASSETS IS PROPER SUBJECT OF ARBITRATION. Plaintiff sought an injunction in court restraining defendant "from doing or performing any acts destructive to the assets or the property of the co-partnership" on dissolution. The court held this was a relief which could be afforded in arbitration and granted defendant's motion for a stay of the court action. *Vogel v. Simon,* 201 N.Y.S. 2d 877 (Lupiano, J.).

GRIEVANCE INVOLVING SUBCONTRACTING OF WORK HELD NOT ARBITRABLE WHERE THE CONTRACT CONTAINED NO REFERENCE TO SUBCONTRACTING. The arbitration clause provided for the arbitration of grievances alleging non-compliance with past policies, practices, customs or usages relative to working conditions, as well as arbitration of questions involving the application or interpretation of the terms of the agreement. The court held that the aforementioned language "was not intended to and does not include within its scope the subject of contracting out maintenance and repair work on plant or equipment to independent contractors." *Independent Petroleum Workers v. Standard Oil Co.,* 275 F. 2d 706 (7th Cir., Castle, C. J.).

ISSUE OF WHETHER OR NOT AN AUTOMOBILE IS "UNINSURED" WITHIN THE TERMS OF THE UNINSURED ENDORSEMENT OF THE INSURANCE POLICY SHOULD BE DETERMINED BEFORE CLAIMANT HAS A RIGHT TO DEMAND ARBITRATION. By the terms of the endorsement the parties agreed to arbitrate only the questions of legal liability and damages. Before such procedures may be resorted to, the claimant must bring himself within the class of persons entitled to arbitrate by meeting the condition precedent of showing the accident was caused by an "uninsured" vehicle. *Mitkewicz v. Travelers Insurance Co.,* 198 N.Y.S. 2d 101 (Macken, J.).

CONTROVERSIAL ISSUES OF FACT WHICH ARE UNCONNECTED WITH A REQUEST FOR ANY TYPE OF RELIEF ARE NOT ARBITRABLE. Petitioner sought arbitration on the following questions only: a) What were all of the transactions of the corporations involved? and b) What were the correct profits of the corporations involved? Said the court: "An agreement for arbitration ordinarily encompasses disposition of the entire controversy between the parties upon which judgment may be entered after judicial confirmation of the award. . . . Such is not the case here." *Kingston Homes, Inc. v. Klines,* 196 N.Y.S. 2d 1010 (Pette, J.).

WHETHER PAYMENT SHOULD BE MADE BY TRUSTEES TO INSURANCE BROKERS FOR SPECIAL SERVICES RENDERED HELD ARBITRABLE. The scope of arbitration in welfare fund trust agreements was determined by the court as follows: "Where a decision by an umpire in favor of the action requested would have permitted the trustees to exceed their powers under the trust, the arbitration sought was not to resolve a dispute within the jurisdiction of the trustees." Using this test, the issue of self-insurance was held to be *ultra vires* as a matter of law, referring to *Barrett v. Miller,* 276 F. 2d 429 (Second Cir., 1960). However, the court held here that "the seeking and receiving of advice from insurance experts clearly falls within the range of matters entrusted to the trustees for their judgment and management under the agreement." An application for appointment of an impartial umpire who would sit with the trustees as a committee to decide such question, was therefore properly granted by the lower court. *Mahoney v. Fisher,* 277 F. 2d 5 (Second Cir.).

WHERE THERE IS A DISPUTE AS TO THE EFFECT OF A CLOSING STATEMENT ON A SPECIFIC ARBITRATION CLAUSE, THAT ISSUE SHOULD BE RESOLVED BY ARBITRATION. A stockholder agreement provided for the purchase of remaining shares of stock by the surviving shareholder, the price to be determined by the corporation accountant and to be "book value." Said amount was determined by arbitration; no immediate objection to the amount was made. Later the purchaser discovered and alleged that the book value as determined was incorrect. The Supreme Court, 21 Misc. 2d 438 (digested in *Arb. J.* 1960, p. 102), held that there was no issue left to be brought to arbitration because of the contract provision that failure to object to the financial statement within certain time limits made the statement "binding and conclusive on both parties." However, the Appellate Division, in reversing, held that the closing agreement did not take the issue of the price of the stock out of arbitration. "The closing memorandum contains no express cancellation of either the stockholder's agreement or of the arbitration provisions which were a part thereof. [It contains no] language which would tend to vitiate either of the arbitration clauses contained in that agreement." *Morgan Trust Co. v. Wasserman,* 10 App. Div. 2d 278 (First Dept., Rabin, J. P.).

WHETHER CLAIM FOR ARBITRATION IS FRIVOLOUS OR NOT IS FOR THE ARBITRATOR TO DECIDE AND NOT THE COURT. Various Federal Circuit Courts were divided on whether a grievance was nonarbitrable because it was allegedly frivolous. The leading New York case of *International Association of Machinists v. Cutler-Hammer, Inc.,* 297 N.Y. 519 (1947), held, "if the meaning of the provision of the contract sought to be arbitrated is beyond dispute, there cannot be anything to arbitrate and the contract cannot be said to provide for arbitration." This doctrine meant that a dispute in issue should first be examined to determine if it is not bona fide or based on substantial grounds. The U.S. Supreme Court has overruled this doctrine by saying: "The agreement is to submit all grievances to arbitration, not merely those the court will deem meritorious. The processing of even frivolous claims may have therapeutic values of which those who are not a part of the plant environment may be quite unaware." *United Steelworkers of America v. American Mfg. Co.,* 363 U.S. 564 (June 20, 1960; Douglas, J.).

WHETHER CONTRACTING-OUT OF WORK VIOLATED COLLECTIVE BARGAINING AGREEMENT HELD ISSUE FOR THE ARBITRATOR TO DECIDE. The collective bargaining agreement contained a provision excluding from arbitration matters which were "strictly a function of management." This phrase, said the U.S. Supreme Court, "must be interpreted as referring only to that over which the contract gives management complete control and unfettered discretion. . . . A specific collective bargaining agreement may exclude contracting-out from the grievance procedure. . . . In such a case a grievance based solely on contracting-out would not be arbitrable. Here, however, there is no such provision. . . . In the absence of any express provision excluding a particular grievance from arbitration, we think only the most forceful evidence of a purpose to exclude the claim from arbitration can

prevail. . . . Whether contracting-out in the present case violated the agreement . . . is a question for the arbiter, not for the courts." The Court reversed the Fifth Circuit Court, which had held by a divided vote (269 F. 2d 633), that contracting-out fell within that exception. *United Steelworkers of America v. Warrior & Gulf Navigation Co.*, 363 U.S. 574 (June 20, 1960; Douglas, J.; Whittaker, J., dissenting).

DECLARATORY JUDGMENT TO DETERMINE WHETHER CERTAIN GRIEVANCES WERE ARBITRABLE DOES NOT LIE WHEN THERE IS NO LONGER ANY ACTUAL CONTROVERSY. Plaintiff sought an adjudication that grievances with respect to merit increases of certain of its employees were not arbitrable. The grievances had already been terminated and withdrawn. The arbitration therefore became moot and an action under the Declaratory Judgment Act does not lie in case of a difference or dispute which has become moot. *Lempco Automotive, Inc. v. Local 1444, Int'l Ass'n of Machinists*, 184 F. Supp. 114 (N. D. Ohio, E. D., Kalbfleisch, D. J.).

CHANGE IN TIMING OF AUTOMATIC SCREW MACHINES, WITH ACCOMPANYING CHANGE IN PIECE-WORK RATE, HELD NOT ARBITRABLE UNDER COLLECTIVE BARGAINING AGREEMENT, as a "method change" within purview of contract forbidding change of production standards unless method of operation was changed. Moreover, the contract excluded from arbitration any provision relating to or affecting the earnings or any rate of any employee. *Underwood Corp. v. Local 267, Int'l Union of Electrical, Radio & Machine Workers, AFL-CIO*, 183 F. Supp. 205 (D. Conn.; Clark, C. J., sitting as District Judge pursuant to statutory designation).

ISSUE OF REINSTATEMENT HELD ARBITRABLE WHERE COLLECTIVE BARGAINING AGREEMENT PROVIDED FOR ARBITRATION OF UNSETTLED GRIEVANCES INCLUDING DISCHARGE OF AN EMPLOYEE. When there was no oral or written agreement in a strike settlement to exclude employees from grievance or arbitration procedure for alleged strike misconduct, the employer was bound to arbitrate discharge of such employees, but such arbitration extended only to the issue of reinstatement and could not include any award of back pay. *Lodge No. 12, Dist. No. 37, Int'l Assoc. of Machinists v. Cameron Iron Works*, 183 F. Supp. 144 (S. D. Texas, Ingraham, D. J.).

III. THE ENFORCEMENT OF ARBITRATION AGREEMENTS

NEW YORK STATE COURT ASSERTS JURISDICTION OVER UNION ATTEMPT TO ENFORCE SPECIFIC PERFORMANCE OF ARBITRATION CLAUSE. The doctrine of Federal pre-emption was held not applicable where the object was not to obtain jurisdiction over additional employees but to enforce an arbitration agreement in behalf of employees already represented by the union. *Local 459, Int'l Union of Electrical, Radio & Machine Workers, AFL-CIO v. Remington Rand*, 21 Misc. 2d 221 (Loreto, J.).

BROAD ARBITRATION CLAUSE IS SUFFICIENT TO INCLUDE CLAIM FOR DAMAGES BASED ON FRAUDULENT INDUCEMENT OF THE CONTRACT. In vacating an order of the U.S. District Court, Puerto Rico, which had stayed arbitration in New York, the First Circuit Court of Appeals saw "no reason why parties should not agree, if they wish to, that if a question arises as to whether the principal agreement was obtained by fraud, that that question will be arbitrated." The court held that "unless, by means of a proper claim for rescission, [a party] has put in issue the 'making of the contract,' it cannot, by merely asserting fraud, stay the arbitration proceedings." To allow one party "to rescind and to keep the fruits of the contracts by permitting it to make substituted restoration would be just another way of allowing it to rescind merely the arbitration clauses, the very part as to which there was no fraud." *Lummus Co. v. Commonwealth Oil Refining Co.*, U.S. Court of Appeals for the First Circuit, Docket Nos. 5552, 5553 and 5554, June 16, 1960; petition for rehearing denied, August 10, 1960, Aldrich, C. J.).

ARBITRATION AGREEMENT IS SEPARABLE FROM THE MAIN CONTRACT, so that "neither an alleged breach nor a repudiation of a contract precludes arbitration under an arbitration clause. . . . Similarly, illegality of the contract in whole or in part does not operate to nullify an agreement to arbitrate." A petition to compel arbitration was therefore granted, referring to *Robert Lawrence Co. v. Devonshire Fabrics,* 271 F. 2d 402 (digested in *Arb. J.* 1959 p. 209). *El Hoss Engineering & Transport Co., Ltd. v. American Independent Oil Co.*, 183 F. Supp. 394 (S.D. N.Y., van Pelt Bryan, J.).

SUPREME COURT IS EMPOWERED TO MAKE AN ORDER COMPELLING ARBITRATION EVEN THOUGH PARTY DID NOT REQUEST THAT RELIEF. Said the court: "Although petitioner has not, in so many words, sought herein an order to compel arbitration . . . upon the granting of the stay under section 1451, this court is of the opinion that under the general prayer for other relief, it has the power to issue such an order in addition to the stay. Arbitration proceedings are equitable in character, and the practice of equity as to relief should be followed. In equity proper relief is ordinarily granted when the facts warrant regardless of what may have been asked for. . . ." *Demchick v. American Eutectic Welding Alloys Sales Co.*, 22 Misc. 2d 920, 201 N.Y.S. 2d 819.

THE RIGHT TO ARBITRATION CANNOT BE DEFEATED BY NAMING AS DEFENDANT IN A COURT ACTION ONE WHO IS NOT A PARTY TO THE ARBITRATION AGREEMENT. The respondent contractor resisted a motion to compel arbitration because he could not bring his own subcontractor into the arbitration since the latter was not a party to the arbitration agreement. The court said: "Should it eventually appear that its own subcontractor has been guilty of some shortcoming for which respondent is legally chargeable, it may have to seek relief in another action." *John H. Eisele Holding Corp. v. Panuccio,* 198 N.Y.S. 2d 525 (Hogan, J.).

MISSISSIPPI COURT HOLDS THAT ITS ARBITRATION STATUTE DOES NOT ABROGATE THE COMMON LAW RULE THAT EITHER PARTY MAY REVOKE AN AGREEMENT TO SUBMIT FUTURE DISPUTES TO ARBITRATION AT ANY TIME BEFORE AN AWARD HAS BEEN RENDERED. *McClendon v. Shutt,* 115 So. 2d 740 (Sup. Ct. Miss., McGehee, C. J.).

NEW YORK COURT ENJOINS PARTY TO ARBITRATION AGREEMENT FROM PROSECUTING PENNSYLVANIA ACTION. Petitioner, a resident of Pennsylvania, contracted with a New York corporation to work in its Pennsylvania territory. The contract contained covenants not to compete, as well as secrecy provisions and time and space restrictions in case of termination. Petitioner left the employ of respondent and immediately entered the employ of a competitor of respondent within the territory restricted by the original contract with respondent. The latter corporation instituted court action in Pennsylvania to enjoin the petitioner from continuing in this competition. It was this action which the petitioner sought to restrain the respondent from continuing, because it was in violation of the contract which provided for arbitration as the sole method of settling such disputes. The court found the dispute fell within the ambit of the arbitration clause and granted the petitioner the restraining order, as well as ordering the arbitration to proceed. *Demchick v. American Eutectic Welding Alloys Sales Co.,* 22 Misc. 2d 920, 201 N.Y.S. 2d 819.

CONNECTICUT SUPREME COURT OF ERRORS HOLDS INDIVIDUAL EMPLOYEE HAS NO RIGHT TO COMPEL ARBITRATION when there is no provision in the collective bargaining agreement authorizing such practice. "The collective bargaining agreement limits the right to arbitrate to the union and the company. No provision is made for arbitration at the request or demand of an employee. Without such a provision in the contract, the plaintiffs cannot compel the defendant to arbitrate." *Arsenault v. General Electric Co.,* 147 Conn. 130, 157 A. 2d 918 (Murphy, J.). A motion for reargument was denied by the Supreme Court of Errors of Connecticut on Feb. 17, 1960; a petition for certiorari to the Supreme Court of the United States was filed on May 16, 1960, 29 U.S. Law Week 3013.

FEDERAL COURT REMANDS MOTION TO STAY ARBITRATION TO STATE COURT SINCE PLAINTIFF CANNOT REMOVE ACTIONS TO THE FEDERAL COURTS. The federal statute authorizing removal of a civil action, 28 U.S.C. sec. 1441(a), permits removal only by a defendant. The action of commencing the arbitration made the grievant here a party-plaintiff in that proceeding and the respondent's motion to stay the arbitration does not in turn change the status of the parties so as to make the grievant a defendant. A motion to stay arbitration in New York is merely a procedural step in the proceedings and does not make a defendant out of the party against whom the motion is brought. *Hall (as President of the Engineers Assoc.) v. Sperry Gyroscope Co., Div. of Sperry Rand Corp.,* 183 F. Supp. 891 (S.D. N.Y., Murphy, D. J.).

FEDERAL COURT HOLDS THAT EMPLOYER'S REFUSAL TO ARBITRATE GRIEVANCE UNDER CONTRACT TERMS IS NOT A VALID EXCUSE FOR THE UNION TO CALL A STRIKE. The proper remedy for the union would have been to compel the employer by court order to comply with the arbitration provisions of the collective bargaining agreement. Citing *Textile Workers Union of America v. Lincoln Mills,* 353 U.S. 448, as authority for granting specific performance in such a situation, the court decried the union's use of "self help" instead of seeking to invoke the court's aid for breach of the contractual obligations by the employer. *Local Union No. 1055, Int'l Bro. of Electrical Workers, AFL-CIO v. Gulf Power Co.,* 182 F. Supp. 950 (N.D. Fla., Carswell, C. J.).

FEDERAL COURT DENIES MOTION TO STAY ARBITRATION ON GROUNDS OF NO JURISDICTION WHERE NO SUIT WAS COMMENCED IN THE FEDERAL COURT. Employer petitioned the Federal District Court for an order staying an arbitration proceeding instituted by the union. Said the court: "The mere petition to stay arbitration cannot . . . stand jurisdictionally by itself," when there is no suit at all pending in the court. "In order to invoke the U.S. Arbitration Act, the court must be provided with an independent basis of jurisdiction." Moreover, said the court, "the Act does not authorize a stay of arbitration, but merely authorizes the stay of an action pending arbitration." *Children's Dress, Etc. Union, Local 91 v. Frankow Mfg. Co.,* 183 F. Supp. 671 (S.D. N.Y., Abruzzo, J.).

COURT GRANTS STAY OF ARBITRATION WHERE IT WAS COMMENCED PREMATURELY. A medical partnership contract provided that if any member should desire to withdraw he should give ninety days' written notice. When a withdrawing partner sought arbitration, the court held his demand premature, since the ninety day period had not been exhausted. Until that time there would be no controversy which could be the subject of an arbitration. *Queens Boulevard Medical Group v. Vistreich,* 201 N.Y.S. 2d 1016 (Tessler, J.).

FEDERAL COURT HAS NO JURISDICTION TO STAY ARBITRATION PROCEEDINGS IN INTERSTATE AND FOREIGN COMMERCE MATTERS. "It is only where the federal court has some other basis of jurisdiction such as diversity of citizenship or federal question that the Federal Arbitration Act, 9 U.S.C. § 1-14, can be applied." *Application of Rosenthal-Block China Corp.,* 183 F. Supp. 659 (S.D. N.Y., Dimock, D. J.).

PROPER PROCEDURE FOR RESTRAINING ARBITRATION IS BY MOVING FOR A STAY UNDER SECTION 1458 N.Y. CIVIL PRACTICE ACT. If a party has not participated in the selection of arbitrators or in any proceedings before them and was not served with an order compelling arbitration, he may put in issue the existence of the contract or the failure to comply therewith "either by a motion for a stay of the arbitration or in opposition to the confirmation of the award." *Queens Boulevard Medical Group v. Vistreich,* 201 N.Y.S. 2d 1016 (Tessler, J.).

BY APPEALING FROM AN ORDER GRANTING A MOTION FOR REARGUMENT OF THE ORIGINAL ORDER, APPELLANT WAIVED HIS RIGHT TO PROSECUTE AN APPEAL FROM THE ORIGINAL ORDER. An order was entered, *inter alia,* confirming an arbitral award. On reargument the court adhered to the original decision. An appeal was taken from this subsequent order. Appellant now attempted to appeal the original order confirming the award. The court held that by appealing from the subsequent order, the appellant waived his right to prosecute his appeal from the order confirming the award. *Martz v. Martz,* 198 N.Y.S. 2d 75 (App. Div. Second Dept.).

PENNSYLVANIA COURT HOLDS ARBITRATION CLAUSE IS SEPARABLE FROM THE MAIN CONTRACT. The court said: "There is no doubt . . . that under the provisions of the [Pennsylvania] Arbitration Act . . . any provision . . . which gives the right to either one party or the other to terminate the agreement, the provision as to arbitration continues to be valid, irrevocable and enforceable." The Supreme Court confirmed the action of the court below in appointing the third arbitrator and authorizing the board of arbitrators to hear and dispose of all matters in controversy. *Aster v. Jack Aloff Co.,* 155 A. 2d 627 (Superior Ct. Pa., Gunther, J.).

PENNSYLVANIA COURT CONFIRMS DISMISSAL OF APPEAL FROM ARBITRATION AWARD BECAUSE OF FAILURE TO SERVE NOTICE OF APPEAL ON ADVERSE ATTORNEYS OR PARTIES AS REQUIRED BY MUNICIPAL COURT RULES. *Meade v. Equitable Credit & Discount Co.,* 155 A. 2d 386 (Superior Ct. of Pa.).

FEDERAL COURT DOES NOT LACK JURISDICTION OVER REINSURANCE DISPUTE WITH LATIN-AMERICAN CORPORATION BECAUSE OF ARBITRATION AGREEMENT BETWEEN THE PARTIES. Instead of making a motion to stay the proceedings pending arbitration, the petitioner moved to dismiss the complaint for lack of jurisdiction of the federal court over the subject matter of the controversy. The court clearly had jurisdiction because of the diversity of citizenship involved, which, said the court, "is not lost even if a motion to stay pending arbitration properly made were granted." *Aero Associates, Inc. v. La Metropolitana,* 183 F. Supp. 357 (S.D. N.Y., Murphy, D. J.).

DISTRICT COURT ORDER REMANDING A CASE TO THE STATE SUPREME COURT IS NOT REVIEWABLE. A motion to stay arbitration was made in a state court. The party seeking arbitration then petitioned the federal district court for removal and to compel arbitration under the Federal Arbitration Act. The district court remanded the proceedings to the state court, 183 F. Supp. 659 (S.D. N.Y.) and this determination was sought to be stayed. Said the Circuit Court: ". . . an order remanding a case to the State court from which it was removed is not reviewable on appeal or otherwise." *Application of Rosenthal-Block China Corp.,* 278 F. 2d 713 (2d Cir., Lumbard, C. J.).

IV. THE ARBITRATOR

FEDERAL COURT REFUSES TO GRANT UNION'S REQUEST FOR APPOINTMENT OF A NEUTRAL TRUSTEE TO RESOLVE DEADLOCK BETWEEN COMPANY AND UNION TRUSTEES OVER MANAGEMENT OF A WELFARE FUND, set up pursuant to Sec. 302 (c) 5 of the Taft-Hartley Act. The dispute centered around whether the fund should become a self-insurer in certain areas of its operation. Arbitration was sought pursuant to a provision of the trust agreement for this method of resolving a deadlock "upon any question coming before the Trustees for decision." The court found that the language of the trust agreement precluded self-insurance and that therefore there was nothing to arbitrate. *Barrett v. Miller,* 276 F. 2d 429 (2d Cir., Waterman, C. J.).

ARBITRATOR'S FAILURE TO DISCLOSE PRIOR RELATIONSHIPS WITH A PARTY OR HIS ATTORNEY MAY BE GROUNDS FOR VACATING AN AWARD. One of three arbitrators, an attorney, had been a member of the same law firm with respondent's trial counsel before the arbitration had been held. In addition, after the award had been rendered, the losing party discovered that the attorney and the arbitrator's law firm had served as co-counsel in a number of matters, one of which was still pending at the time of the arbitration. The court said: "Unquestionably, the foregoing relationships disqualified the attorney arbitrator from acting in this case in the absence of a waiver by appellant. Since the record negatives disclosure or knowledge by appellant of the disqualifying relationships, there was no waiver." In so holding the Appellate Division reversed the Supreme Court, 20 Misc. 2d 504 (digested in *Arb. J.* 1960, p. 107). *Milliken Woolens v. Weber Knit Sportswear,* 11 App. Div. 2d 166, 202 N.Y.S. 2d 431 (First Dept., Valente, J.).

SUBSEQUENT ACTS OR DOCUMENTS PURPORTING OR CLAIMED TO TERMINATE AN AGREEMENT CONTAINING A BROAD ARBITRATION CLAUSE, IF IN DISPUTE, RAISE ISSUES FOR THE ARBITRATORS AND NOT FOR THE COURT. *Tracy v. Meyerson,* N.Y.L.J., Feb. 9, 1960, p. 12 (Gavagan, J.), aff'd without opinion 200 N.Y.S. 2d 360 (First Dept.).

ARBITRATORS ARE NOT REQUIRED TO MAKE FINDINGS OF FACT OR ASSIGN REASONS FOR THEIR AWARDS. The court held that even if they state erroneous reasons for their conclusions, that would not be fatal. *Lauria v. Soriano,* 180 Advance California Appellate Reports 159 (Second Dist., Div. Two, Ashburn, J.).

ARBITRATORS ARE NOT REQUIRED TO GIVE WRITTEN OPINIONS FOR THEIR AWARDS. The court denied an application for an order vacating the award, stating that the only ground for the appeal was the lack of an opinion rendered by the arbitrator. Said the court: "The rules of arbitration permit an opinion. They do not require it." *Sherman v. Harry Maring, Jr., Inc.,* Superior Court, Fairfield County, Conn., No. 111,510, July 19, 1960, Healy, J.

ARBITRATOR CANNOT BE REMOVED PRIOR TO THE RENDERING OF AN AWARD UNDER NEW YORK ARBITRATION LAW. The court held that at least in absence of a showing of actual corruption it was without authority to declare that an arbitrator appointed in a partnership dissolution agreement was disqualified because his son had joined the firm as a partner after dissolution of the original firm. "The power of the Court is fixed by statute. No authority is found for the relief sought herein. The proper procedure is to move following the award." *Diamond v. Glatzer,* 192 N.Y.S. 2d 306 (Hogan, J.).

REFUSAL TO POSTPONE HEARINGS DID NOT CONSTITUTE SUCH MISCONDUCT AS TO UPSET AN AWARD. Complainant admitted he received notice of the hearings and admitted further that he signed a stipulation to adjourn the originally scheduled hearing. Such evidence does not warrant a finding of misconduct if the arbitrator fails to postpone the hearing in order to give the employer more time for preparation of the hearing. *Minkoff v. Scranton Frocks,* 181 F. Supp. 542 (S.D. N.Y., Metzner, D. J.).

ARBITRATOR NOT GUILTY OF MISCONDUCT IN FAILING TO GRANT ADJOURNMENT TO PARTY. A commercial company situated in Goa, Portuguese India, was sent a demand for arbitration together with a list of arbitrators from which it was asked to make a selection. When the list was not returned in due course the administrator selected an arbitrator pursuant to its rules and notified the foreign party of a date for the commencement of the hearings. Two days prior to the commencement of the hearings a request for an adjournment was made of the arbitrator. The latter request was denied and an award was rendered. On a motion to confirm the award the claim was made that the arbitrator was guilty of misconduct in failing to postpone the hearings. The Court of Appeals affirmed the decision of the Appellate Division, 7 App. Div. 2d 629, which had held that the refusal of the arbitrator to grant a postponement was a valid exercise of his discretion in light of delaying tactics adopted and the sufficient notice received by the complainant of the pendency of the proceedings. *Golodetz v. Timblo Irmaos Limitada,* 8 N.Y. 2d 720.

CALIFORNIA COURT UPHOLDS ARBITRATION AWARD, STATING THAT AN ARBITRATOR CANNOT IMPEACH HIS AWARD BY TESTIFYING TO HIS OWN FRAUD OR MISCONDUCT. In challenging an award on the grounds of misconduct of the arbitrators, the claimant introduced an affidavit alleging a conversation between himself and one of the three arbitrators in which the latter said he had nothing to do with the decision and that the complaining party got a "pretty rough deal." The court held this was not sufficient to impeach the award as no affidavit or other testimony of the arbitrator himself was produced, and the alleged conversation was on the night of the ruling, while the formal award in which this arbitrator joined was not signed until three weeks later. *Lauria v. Soriano,* 180 Advance California Appellate Reports 159 (Second Dist., Div. Two, Ashburn, J.).

ARBITRATORS' AWARDS NEED NOT CONTAIN FINDINGS OF FACT. District of Columbia Code, Title 16 § 1706, requires findings of fact to be made by a referee or court-appointed arbitrator. However, where the arbitrator is selected under American Arbitration Association Rules, there is no need for findings to be included in the award, since sec. 41 of AAA's Rules do not require it. This was the per curiam holding of the Court of Appeals, District of Columbia Circuit, in affirming the District Court's decision. *Hale v. Friedman,* U.S. Court of Appeals for the District of Columbia, No. 15, 598 (June 30, 1960).

ARBITRATORS HAVE NO OBLIGATION TO GIVE THEIR REASONS FOR AN AWARD. Said the U.S. Supreme Court: "To require opinions free of ambiguity may lead arbitrators to play it safe by writing no supporting opinions. This would be undesirable for a well reasoned opinion tends to engender confidence in the integrity of the process and aids in clarifying the underlying agreement." *United Steelworkers of America v. Enterprise Wheel & Car Corp.,* 363 U.S. 593 (June 20, 1960; Douglas, J.; Whittaker, J., dissenting).

V. THE PROCEEDINGS

STATUTE OF LIMITATIONS APPLIES TO ARBITRATION PROCEEDINGS. Petitioner claimed that the applicable section (1458-a N.Y. C.P.A.) was enacted after the accrual of his right to arbitrate and was therefore not controlling. But the court said: ". . . the statute merely codified and clarified the existing common law. It was the law that arbitrators could not consider issues barred by limitations." *Application of Plastic Molded Arts Corp.,* 200 N.Y.S. 2d 858 (Steuer, J.).

PARTICIPATION IN ARBITRATION PROCEEDINGS IS WAIVER OF RIGHT TO SEEK RESCISSION OF CONTRACT ON GROUNDS OF ALLEGED FRAUD IN THE PROCUREMENT. The plaintiff had participated in the selection of arbitrators and otherwise taken part in the arbitration proceedings long after he had become aware of the alleged fraud practiced by the defendants in the procurement of the contract. The Appellate Division affirmed the lower court opinion, 21 Misc. 2d 506 (digested in *Arb. J.* 1960 p. 109), and modified it only to the extent of granting the defendant's cross-motion to dismiss the complaint. *Milton L. Ehrlich, Inc. v. Swiss Construction Corp.,* 11 App. Div. 2d 644, 201 N.Y.S. 2d 133 (First Dept.).

WHETHER AN ARBITRATION HEARING SHOULD BE REOPENED FOR THE TAKING OF ADDITIONAL TESTIMONY RESTS WITHIN THE DISCRETION OF THE ARBITRATORS. Even an abuse of such discretion, in the absence of misconduct, would not be ground for setting aside an award, all the more when the complaining party had previously been afforded ample opportunity to present all its claims fully. *Big-W Construction Corp. v. Horowitz,* 192 N.Y.S. 2d 721 (Shapiro, J.).

DISCOVERY PROCEDURES HELD NOT AVAILABLE TO ANY PARTY IN PROCEEDINGS BEFORE ARBITRATORS. Plaintiff brought an action to enjoin the defendant from proceeding with arbitration pending full discovery by the plaintiff from the defendant of its claims pursuant to the Federal Rules of Civil Procedure. Said the court: "In a proceeding before arbitrators neither the statute nor the rules make available to any party thereto the discovery procedures provided in the Federal Rules of Civil Procedure." *Foremost Yarn Mills, Inc. v. Rose Mills, Inc.*, 25 F.R.D. 9 (E.D. Pa., Clary, D. J.).

VI. THE AWARD

PENNSYLVANIA COURT VACATES ARBITRATION AWARD BECAUSE OF ARBITRATOR'S FAILURE TO FILE AWARD WITHIN PRESCRIBED TIME. The Municipal Court Rules of Philadelphia require an arbitration award to be filed within twenty days after the hearing. The award was filed some 37 days after the hearing and the court on its own motion struck the award for error appearing on the face of the record because of the board's non-compliance with the filing provisions. The Superior Court of Pennsylvania held the order non-appealable because of its interlocutory nature. *Damon v. Berger,* 155 A. 2d 388 (Superior Court, Pa., Rhodes, P. J.).

"UNLESS RESTRICTED BY THE AGREEMENT OF SUBMISSION, ARBITRATORS ARE THE FINAL JUDGES OF BOTH LAW AND FACT, AND AN AWARD WILL NOT BE REVIEWED OR SET ASIDE FOR MISTAKE IN EITHER." *Aster v. Jack Aloff Co.,* 155 A. 2d 627 (Superior Ct. Pa., Gunther, J.).

COURT CANNOT REVIEW DECISION OF ARBITRATORS ON THE MERITS. "Courts cannot rejudge the decision of arbitrators on the merits. If the courts could rejudge the decision then the value of arbitration would be lost. However, the decision of arbitrators can be upset if it was procured by fraud or corruption, if there was evident partiality, if the arbitrators exceeded their powers, or if their decision was a perverse misconstruction of the law." *Amicizia Societa Nav. v. Chilean Nitrate & Iodine Sales Corp.,* 184 F. Supp. 116 (S.D. N.Y., Chanin, J.).

BY CONSTRUING LANGUAGE OF COLLECTIVE BARGAINING AGREEMENT TO REQUIRE EMPLOYER TO PAY FOR COLUMBUS DAY, ARBITRATOR ACTED WITHIN HIS POWERS AND IS NOT CHARGEABLE WITH MISCONDUCT. The agreement provided that employees were to receive payment for Columbus Day. In 1957 that holiday fell on a Saturday. Under a prior agreement, holidays falling on non-working days such as Saturday were not paid for. The Court of Appeals affirmed a decision of the Appellate Division, 185 N.Y.S. 2d 1021 (digested in *Arb. J.* 1959, p. 41), which had denied that there was a 'perverse misconstruction' of the documents and proofs submitted to the arbitrator. *S. & W. Fine Foods v. Office Employees Int'l Union,* 7 N.Y. 2d 1018, 200 N.Y.S. 2d 59.

COURTS WILL NOT REVIEW ARBITRATION AWARDS FOR ERRORS OF FACT OR LAW. In confirming an award the court said: "Helpful briefs furnished by the parties show their familiarity with the law governing arbitration but they differ on its applicaton. The Court cannot and should not vacate an award because it does not agree with it, even if it does not. The parties have selected their own tribunal and have agreed its decision shall be final and binding upon both parties." *Royal McBee Corp. v. Royal Industrial Union,* Superior Court, Hartford County, Conn., April 27, 1960, No. 120249.

UNION HAS NO RIGHT TO BRING ACTION IN FEDERAL COURT TO RECOVER WAGES DUE under an arbitration award to individual employees, in the absence of a showing that the union had been commissioned to prosecute the action as their representative. *Mississippi Valley Electric Co. v. Local 130, Int'l Bro. of Electrical Workers, AFL-CIO,* 278 F. 2d 764 (5th Cir., Cameron, C. J.).

ARBITRAL AWARD FOR BACK PAY SUBSEQUENT TO THE DATE OF TERMINATION OF COLLECTIVE BARGAINING AGREEMENT HELD ENFORCEABLE. Said the U.S. Supreme Court: "The refusal of courts to review the merits of an arbitration award is the proper approach to arbitration under collective bargaining agreements. The federal policy of settling labor disputes by arbitration would be undermined if courts had the final say on the merits of awards." *United Steelworkers of America v. Enterprise Wheel & Car Corp.,* 363 U.S. 593 (June 20, 1960; Douglas, J.; Whittaker, J., dissenting).

CONFIRMATION OF AWARD REFUSED WHERE BUILDER WAS GIVEN THE OPTION TO COMPLETE ITEMS NOT PERFORMED OR TO CREDIT THE OWNERS IF THE ITEMS WERE LEFT UNDONE. The court did not compel specific performance of an unfinished building contract where the act of the builder was optional with him and no time limit was expressed in the award within which the option had to be exercised. Treating the award as not final or definite (under sec. 1462 subd. 4 C.P.A.), the matter was remitted to the arbitrators for clarification and correction. *Rapisarda v. Licata,* 198 N.Y.S. 2d 530 (Hogan, J.).

FOREIGN AWARD, REDUCED TO JUDGMENT IN FOREIGN COUNTRY, IS GIVEN EFFECT IN NEW YORK EVEN THOUGH THE JUDGMENT WAS NOT VALID IN NEW YORK FOR LACK OF JURISDICTION OVER THE DEFENDANT. Under English law an arbitration award merges into a judgment. Plaintiff obtained an award and judgment thereon in England, but personal jurisdiction of the defendant had not been obtained for the judgment. Plaintiff obtained summary judgment on the award in New York, 9 Misc. 2d 651, 170 N.Y.S. 2d 378 (digested in *Arb. J.* 1958, p. 61), and both the Appellate Division and the Court of Appeals upheld the summary judgment (7 App. Div. 2d 977, 183 N.Y.S. 2d 83). *Oilcakes & Oilseeds Trading Co. v. Sinason-Teicher Inter American Grain Corp.,* 8 N.Y. 2d 852.

AWARD DIRECTING SPECIFIC PERFORMANCE UPHELD. The Court of Appeals affirmed the decision of the Appellate Division, 7 App. Div. 2d 367 (digested in *Arb. J.* 1959, p. 44), directing specific performance of a contract for the construction of a building to be rented for use as a retail department store. The court, holding that the enforcement would not be contrary to public policy, said: "It would be quite remarkable if, after these parties had agreed that arbitrators might award specific performance and after the arbitrators had so ordered, the courts would, contrary to the command of article 84 of the Civil Practice Act, frustrate the whole arbitration process by refusing to confirm the award. The only ground suggested for such a refusal is that confirmation would involve the court in supervision of a complex and extended construction contract. We hold that this apprehension or speculation is no deterrent to confirmation by the courts." *Grayson-Robinson Stores v. Iris Construction Corp.*, 8 N.Y. 2d 133, 202 N.Y.S. 2d 303 (Desmond, C. J.; van Voorhis, J., dissenting).

PENNSYLVANIA ARBITRATION STATUTE IS NOT IN DEROGATION OF THE COMMON LAW OF THAT STATE. Consequently, where an award may be invalid for failure to comply with all the provisions of the statute of 1927, it may nevertheless be upheld as a valid common law arbitration award where the intent of the parties did not indicate that they desired statutory arbitration only. *Freeman v. Ajax Foundry Products,* 159 A. 2d 708 (Pa. Supreme Court).

COUNTY IN WHICH ARBITRATION PROCEEDINGS WERE "HAD" IS THE ONLY ONE IN WHICH JUDGMENT MAY BE ENTERED ON THE AWARD. The California Appellate Court reversed the Los Angeles County trial court's confirmation of an arbitration award. Even though evidence forwarded to arbitrators was taken in Los Angeles County, it could not be said that arbitration had been "had" in that county for purposes of sec. 1287, Civil Procedure Code, permitting judgment to be entered on an award in the Superior Court in the county in which arbitration was had. *Aurandt v. Hire,* 346 P. 2d 800 (Cal. Appeal, 2d Dist. Div. 1, Bishop, J.).

COMMON LAW ACTION MAY BE BROUGHT TO ENFORCE AN AWARD WHERE STATUTORY PROCEDURE FOR CONFIRMATION OF AN AWARD WAS NOT FOLLOWED. Plaintiff in a construction dispute sued on an arbitral award to recover damages for failure to comply with the award. Defendant pleaded the cause of action was defective for failure to allege the entry of a judgment on the award. Said the court: "Confirmation of and entry of judgment upon an award must follow statutory procedure for enforcement of the award if intended as the exclusive remedy for its enforcement. Otherwise, a common law action may be brought to enforce the award." The defendant's motion to dismiss was therefore denied, because the action appeared to be maintainable. *Nicholson v. Shirley Enterprises,* 200 N.Y.S. 2d 894 (Nathan, Jr., J.).